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IN THE

# Supreme Court of the United States

October Term, 1955

No. 522

JULIUS BASCOM MCBRIDE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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# Supreme Court of the United States

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JULIUS BASCOM MCBRIDE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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Petitioner, Julius Bascom McBride, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 9, 1955.

## Opinions Below

The District Court rendered no opinion.

The opinion of the Court of Appeals for the Fifth Circuit, is reported at 225 F. 2d 249, and is printed as Appendix "A", pp. 39-52.

## Jurisdiction

The judgments of the Court of Appeals for the Fifth Circuit were entered on August 9, 1955 (R. 929). Rehearing was denied on September 17, 1955 (R. 938), and Mr. Justice Black extended the time within which to file the Petition for Writ of certiorari to and including November 17, 1955 (R. 943). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## Questions Presented

1. During the course of Petitioner's trial on criminal charges, the United States Attorney had reasonable cause to believe that Petitioner was insane or mentally incompetent to stand trial; and the United States Attorney therefore moved the Court to suspend the trial for psychiatric examination of Petitioner, under 18 U.S.C. § 4244, which provides that upon such motion "the court shall cause" the defendant to be examined by a psychiatrist, and shall, upon formal hearing, determine whether the defendant is sane and mentally competent. The Trial Judge denied the motion, summarily. Thereafter, could the District Court properly proceed with the trial, or enter a judgment of conviction; and could the Court of Appeals properly affirm such a conviction?

2. The Trial Court on numerous occasions openly mocked and ridiculed Petitioner during his trial, evoking laughter at Petitioner's expense, and otherwise became personally embroiled against Petitioner and directed the jury's attention to Petitioner's personal defects and failings. May conviction after such a trial be sustained, or must it be reversed for failure of the Trial Court to adhere to the standards heretofore established by this Court, for the impartial treatment

of all criminal defendants and the maintenance of a judicial atmosphere throughout criminal trials?

3. Petitioner, a licensed physician, employed drugs in personally attending one of his regular patients in the course of his professional practice. Petitioner in fact believed that the drugs would be beneficial and also not harmful to his patient; and his patient was in fact able to resume normal vocational duties because of his treatment. May Petitioner be held obligated to keep records relating to this use of narcotics, under 26 U.S.C. § 2554[1] which completely exempts from such record keeping "the dispensing or distribution of narcotic drugs * * * by a physician * * * in the course of his professional practice only * * * to a patient upon whom such physician * * * shall personally attend"?

4. May a conviction for violation of 26 U.S.C. § 2554 be sustained, when the Trial Court has charged the Jury that a physician is not entitled to the exemption quoted in question 3, unless he used the drug in conformity with "standard medical practice"?

5. Where a defendant was on trial under criminal statutes which proscribe "willfully" making "fraudulent" statements or representations in writing, "fraudulently" or "for the purpose of defrauding the United States," may the Court charge the jury that "it is not necessary that the Government prove that the defendant in fact had an evil intent"?

6. Where defendant is being tried on indictments grounded upon 18 U.S.C. § 494, covering false records "for the purpose

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[1] Internal Revenue Code of 1939, now Section 4705 of the Internal Revenue Code of 1954. References hereinafter are to the Code of 1939, under which Petitioner was tried and convicted.

of defrauding the United States" and 26 U.S.C. § 3793,[2] which covers falsification of records required by the Internal Revenue Laws if done "fraudulently", may the Trial Court instruct the jury that it can and should convict if it finds that the acts were done "deliberately and voluntarily," and that it need not find that there was any evil intention?

## Statutes Involved

The various statutory provisions involved in this case are set out in Appendix "B", pp. 53-60).

## Statement of the Case

Petitioner was convicted on 26 counts of failing to employ and to maintain proper records of his prescriptions of narcotics to a particular patient. The issues involved concern both the conduct of Petitioner's trial, and the proper interpretation of the four statutes upon which the conviction rests: the Harrison Narcotics Act, 26 U.S.C. § 2554; the False Claims Act, 18 U.S.C. § 1001; the general forgery criminal provision, 18 U.S.C. § 494; and the general proscription against false tax returns, 26 U.S.C. § 3793.

Petitioner is a licensed practicing osteopathic physician. He had engaged in active medical practice in Houston, Texas, for 20 years. (R. 713). Since 1948, he had as a patient one Lawrence D. Morrison, a police Inspector who subsequently became Chief of Police of Houston. (R. 638, 715, 718). Petitioner treated Morrison regularly, by osteopathic manipulations, approximately once a month, in order to relieve an arthritic condition in Morrison's back and spine. (R. 716-717).

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[2] Internal Revenue Code of 1939, now Section 7206(3) of the Internal Revenue Code of 1954. References hereinafter are to the Code of 1939, under which petitioner was tried and convicted.

In 1952, when Petitioner and Morrison had already for approximately four years been in the relationship of physician and patient, Morrison was injured in an automobile accident. Morrison experienced such extreme pain in his arm, back and shoulder, that he was no longer physically able to work. (R. 565, 639). He had apparently suffered a ruptured or diseased spinal disc. (R. 566, 583-584, 623-624, 643). Morrison consulted other physicians besides petitioner, and was treated by them. (R. 640, 641, 643, 645, 647, 650, 661, 664, 670, 683). But Petitioner was the only physician whose treatments restored Morrison to physical ability to pursue his vocational duties. (R. 640, 641, 643, 646-650, 654-655, 688, 746).

Petitioner treated Morrison by osteopathic manipulations and by the administration of codeine. (R. 720, 726, 746). It is Petitioner's use of this drug which led to his indictment and conviction. Codeine, although not controlled by the statute as an addictive drug, was formerly regarded as non-addictive by the medical profession generally. (R. 301, 349, 355). Petitioner regarded codeine as non-addictive in fact, an opinion shared by other physicians. (R. 353, 769, 771, 776, 779). Petitioner wholeheartedly believed that he was applying his best professional judgment, in the course of his professional practice, to the proper attendance upon and treatment of his patient, Morrison.

Petitioner believed that he was not obligated under the Narcotics Act to maintain records of the codeine dispensed or administered to Morrison in the course of this treatment. His understanding was that "When personally—when you are in personal attendance or personally administered by the doctor, you don't even have to keep a record of it." (R. 756). The reference is obviously to the exception in 26 U.S.C. § 2554 (c) (1); see Point III, pp. 21-24, *infra*.

For his own use, however, in keeping patients' accounts and for other purposes of his own, Petitioner did maintain such a record. (R. 784, 787, 800).

In these records, Petitioner did not show Morrison's name, but noted the name of Billy Jackson, another of his patients, as a code or "anonymous" symbol for his own personal use. (R. 786, 789). His method did distinguish the drugs dispensed to Morrison. (R. 787, 789). These records were readily available to Government inspectors. When a Government inspector came to see his narcotics records, Petitioner immediately produced them and explained them fully. (R, 63-66, 75-79, 130-134, 143-146, 156-159, 168, 190, 192, 203-205, 216, 217-219, 790-791, 797-801). From the start of the inquiry which culminated in this prosecution, the Government knew which drugs had been prescribed for Morrison and administered to him.

In the fall of 1954, when Morrison was Chief of Police and a controversial public and political figure in Houston (R. 698, 701), Petitioner was indicted. Thirteen counts of the 26-count indictment rested on the Narcotics Act, and in effect alleged that Petitioner's use of the drug in his medical treatment of Morrison was not a dispensation or distribution of drugs in the course of Petitioner's professional practice, to a patient upon whom Petitioner was personally attending. The other counts concerned Petitioner's noting "Billy Jackson" on his personal records, for dispensations made to Morrison. Five counts alleged that this constituted a willful falsification and concealment of a matter within the Government's jurisdiction, in violation of 18 U.S.C. § 1001. Four alleged a violation of 18 U.S.C. § 494, embracing the forgery or falsification of records "for the purpose of defrauding the United States." The remaining

four were grounded on the false records section of the Internal Revenue Code, 26 U.S.C. § 3793, alleging that Petitioner maintained his own records "fraudulently".

At the two day trial, the Government's case consisted essentially of the testimony of Government Agents, with respect to their investigation of Petitioner, and the testimony of medical experts, principally to the effect that the quantity of codeine prescribed by Petitioner for Morrison exceeded "standard medical practice". The defense in addition to testimony as to Petitioner's good reputation, consisted of evidence demonstrating that the dispensation of the drug had been made by the Petitioner in the course of his professional practice to Morrison as a patient, and other evidence negativing any evil intention, or any purpose or effect of defrauding the Government.

The Court's charge to the jury consisted almost exclusively of reading and paraphrasing the statutes involved. (R. 845, *et seq.)*. Turning first to 18 U.S.C. § 1001, the Court stated that "wilfulness is an element of the offense charged"; but it removed the issue of criminal purpose from the case by instructing the jury that "to prove this element, it is not necessary that the Government prove that the Defendant in fact had an evil intent." (R. 854).

In discussing the thirteen counts based on the Narcotics Act, the Judge did not refer to the statutory wording establishing professional practice and treatment of a patient as decisive (except to quote the language). He charged, instead, that "standard medical practice" was the crucial issue. The jury was directed that Petitioner's "right to prescribe is subject to the limitations, as I have told you, that it must be done in accordance with recognized, standard medical practice." (R. 858-859).

In the charge to the jury on the other two statutes, 18 U.S.C. §494, and 26 U.S.C. § 3793, the Court in effect declared that a guilty verdict was necessary if the acts—of recording "Billy Jackson" while dispensing and intending to dispense to Lawrence D. Morrison (R. 865)—were done "deliberately and voluntarily". (R. 862).

Petitioner's own testimony was the most vital component of the case for the defense. Unfortunately, Petitioner's testimony was not well presented. Petitioner has a physical impediment of speech (R. 777, 794, 803, 810); he was obviously under intense emotional pressures; and his testimony was not self controlled but was unresponsive and wandering, including many remarks which were foolish as well as irrelevant (R. 727, 734, 743, 751, 761-3, 766, 768, 790, 803, 807, 814). The jury was sensitized to Petitioner's defects and failings by the Trial Court itself. The Trial Judge personally mocked and ridiculed Petitioner. (R. 730, 734, 739, 751, 761, 765, 766, 810). On numerous occasions, for example, the Court's words evoked open laughter at Petitioner (R. 730, 734, 765, 766).

Petitioner's testimony included specific references to a serious head injury and to self-awareness of emotional instability. Because of such statements, the United States Attorney, during the course of Petitioner's testimony, moved the Court to invoke the procedures required by 18 U.S.C. § 4244. The Government prosecutor invoked this statute expressly. According to the United States Attorney, the appropriate course was to suspend the trial and proceed forthwith to the psychiatric examination of Petitioner, and to the judicial hearing on, and determination of, Petitioner's sanity and mental competence to stand trial. (R. 796-7). This motion was denied summarily, the Court apparently not

even consulting the law itself. (R. 796-7). The Court ultimately relied upon the testimony of the Petitioner himself, that he believed himself sane, as a medical opinion (R. 797). Thereupon the trial was immediately resumed, and was completed that same night, as the Judge had insisted (R. 710).

After receiving these instructions, the jury found Petitioner guilty on all 26 counts. (R. 882-883). Petitioner was sentenced to imprisonment for thirty months, on all 26 counts "generally". (R. 886). The Court recommended "commitment to Hospital-type institution in Springfield, Missouri.'" (R. 886).

Upon appeal, the Court of Appeals for the Fifth Circuit affirmed. (R. 913-928; 225 F. 2d 249). It held, *inter alia*, that it was proper to use the touchstone of "standard medical practice"; that "wilfulness" or evil intent was not an essential ingredient of the offenses; and that the Trial Court had neither been inconsiderate of Petitioner's emotional state nor had created an unjudicial atmosphere at his trial.

## Reasons for Granting the Writ

### I.

This case presents an issue of general importance in all Federal criminal trials wherein the sanity of the defendant is questioned. That issue is whether a Trial Judge must order the psychiatric examination required by 18 U.S.C. § 4244 upon the making of the proper motion by the Government attorney; or whether the Court may bypass that statutory procedure and go forward with the trial, on the basis of only its own judgment that the defendant is sane. The latter procedure was followed at Petitioner's trial, and was sustained by the decision below.

During the course of Petitioner's trial, the Government moved that Petitioner be examined, before continuing with the trial, pursuant to 18 U.S.C. § 4244. This statute, in pertinent part, reads as follows:

> "Whenever after arrest and prior to the imposition of sentence * * * the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused * * * to be examined as to his mental condition by at least one qualified phychiatrist, who shall report to the court. * * * If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted * * *."

It was Petitioner's own testimony that gave the Government reasonable cause to doubt that he was mentally competent to stand trial, and Government counsel took the first opportunity to notify the Court that

> " * * * the Government moves, under Section 4244, of Title 18, to refer this defendant for psychiatric examination before the question of his guilt or innocence is presented to the jury. Your Honor has heard this testimony here recently, within the last few hours; it's fresh in the Court's mind, and I will not attempt to recall all the things, I'll just mention that the de-

> fendant on the stand, testified 'Maybe I need a psychiatrist;' he said, 'If I was a doctor,' and he furthermore has testified that he suffered a brain injury for which he was confined in the hospital for more than a year. Under these conditions, the Government does not feel that the question of this defendant's guilt or innocence should be presented to the jury on a criminal charge, but that he should be referred to a psychiatrist or a board of psychiatrists for examination, until, of course, the report of the board of psychiatrists is in the Court's hands." (R. 794-795).

This Government motion was expressly based upon a specific statute containing mandatory language. It was made in obvious good faith. It recited substantial grounds based upon fact. The Government's evident purpose was to insure against the trial and conviction of a defendant who might actually be insane or mentally incompetent.

Despite all this, the Court denied the motion, and offered no explanation of its ruling. (R. 797). Treating the motion summarily, not pausing even to consult the cited statute, the Court first overcame its own incredulity that the Government should desire an interruption once jeopardy had attached. (R. 795). Then the Court invited defense counsel to state whether he desired to continue with the trial, which he did. Finally, the Court actually consulted Petitioner as to his own sanity. (R. 796, 797). Petitioner, an osteopath, replied, "I'm sure I'm sane"; the Court asked, "Are you giving that as a medical opinion?"; and when this question was answered in the affirmative, the Trial Judge denied the motion and continued with the trial. (R. 796, 797). Not even this lip service was paid the issue of whether petitioner, even if sane, was "so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense."

The Court's impatience and indifference with the question of Petitioner's mental state *at* the trial, on October 22, 1954, may be contrasted with the Court's attitude after the trial. In passing sentence, on November 26, 1954, the Trial Judge recommended "commitment to: Hospital-type institution in Springfield, Missouri." (R. 886). This may show a belated recognition that the Court recognized its error in denying this motion; at the very least, it proves that there was a genuine and solid basis for the motion of the United States Attorney. In any event, it does not change the fact that when the motion was made at the trial, the Court denied it almost intuitively, without any real consideration; and pressed forward with the trial.

Petitioner was thus convicted while his prosecutors believed him to be insane or mentally incompetent, and with the Trial Judge exhibiting no serious concern with the problem of his actual fitness to stand trial. This shocking result was caused solely by the Trial Court's unwillingness to follow procedures designed by Congress precisely to resolve the issue of a criminal defendant's sanity and competence.

Such a conviction is invalid. It is invalid from its inception, and it cannot subsequently be endowed with legitimacy either by the failure of the parties to raise the point on appeal,[3] or by the failure of the Court below to reverse

[3] The Government evidently believed that its obligation on appeal was discharged by the following paragraph on page 73 of its Brief on Appeal:

> "Appellant's testimony was of an extraordinary character. While there were other possible explanations * * * yet Government counsel could not overlook the serious head injury sustained by appellant in 1938 (R. 777-778) and the very real possibility that the appellant might be of unsound mind. Hence after the evening recess the night the case was argued the Government, out of the hearing of the jury, moved under

and remand with instructions to comply with procedures Congress established as jurisdictional. The fact is that Petitioner's conviction cannot be sustained, without overlooking or overriding not only the plain language of 18 U.S.C. § 4244, but also the patent Congressional purpose, the decisions of other Circuits, and the most fundamental concepts of fair and constitutional criminal procedure.

There can be no mistaking the mandatory quality of the legislative language. It prescribes that, *whenever* a motion is made by the United States Attorney, as it was in this case, "the court *shall cause*" (emphasis added) the accused to be examined. These words leave no visible room for judicial discretion.

Moreover, this statutory language is exactly expressive of the Congressional purpose. The Committee Reports in both Houses of Congress emphasized that this law was " * * * the product of a long study, by a committee of the Judicial Conference of the United States working in close cooperation with representatives of the Department of Justice * * *" Sen. Rep. No. 209, 81st Cong., 1st Sess., p. 1 (1949); H. R. Rep. No. 1319, 81st Cong., 1st Sess., p. 1 (1949).[4]

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18 U.S.C. 4244 to have appellant examined. If he actually had been of unsound mind, government counsel would have violated their duty by securing a conviction for a felony, or if he had been acquitted, he would have been entitled to reregister for his narcotics license again, and could have gone on with his dispensations unrestricted. If he were of sound mind, as the trial court considered, then appellant would have suffered no harm (and he complains of none here) and government counsel would have discharged their duty under the statute (as they did)."

[4] The legislative history of Section 4244 is set forth in detail in **Greenwood v. United States,** 219 F. 2d 376, 380-384 (C.A. 8, 1955), **cert. granted,** 24 U.S. Law Week 3094, October 11, 1955, No. 460, Current Term. The question involved in that case is different from the one here before this Court.

The problem to which this legislation was such a carefully studied solution was that "A disturbing number of persons are being sentenced for Federal offenses and sent to prison who, because of insanity, should not have been convicted, and who, because of their mental incapacity to participate rationally in their defense, should never have been brought to trial * * *" Sen. Rep. No. 209, 81st Cong., 1st Sess., p. 2 (1949).[5] Congress necessarily intended to reduce the number of such persons to zero. Its goal was that no Federal criminal trial proceed unless there was all the certainty which specialized psychiatric and legal science could produce, that the defendant was in fact sane and mentally competent.

The Congress realized that any "conviction of an insane person is void and open to attack on habeas corpus." See *Youtsey v. United States*, 97 Fed. 937, 940 (C.A. 6, 1899). It wished to eliminate the possibility of such collateral attacks upon judgments in criminal cases, by making these procedures mandatory. In the only amendment to the original Committee proposals, Congress changed "may" to "shall" in Section 4247, for the express purpose of making that Section mandatory, rather than discretionary. 95 Cong. Rec. 12270 (1949). Obviously, Congress meant that the "shall cause" in 18 U.S.C. § 4244 should be mandatory and jurisdictional.

The mandatory character of the Congressional purpose and language has been generally observed, prior to the decision below. Motions for psychiatric examination have been granted, apparently automatically, either on motion of the

[5] From a letter dated March 17, 1949, from The Assistant to the Attorney General to the Chairman of the Senate Committee on the Judiciary.

Government[6] or on motion of the defendant[7] or on the Court's own motion[8] or without specifying on whose motion[9] or at different times, first on the Government's motion, then on motion of the Court itself and subsequently on defendant's motion.[10] This case appears to be the first one where a motion made by the Government under 18 U.S.C. § 4244 has been denied. While there are cases of denials of motions by defendants, which perhaps do not fall quite so literally within the express terms of the statute, the denials are insignificant in number, when compared with the authority cited above, and have never been affirmed on any basis which would be even remotely applicable here.

In this case, the motion by the Government was made in good faith and recited substantial grounds. In *Shelton v. United States,* 205 F. 2d 806, 815 (C.A. 5, 1953), on the other hand, defendant's motion was so obviously interposed frivolously and in bad faith that defendant himself asked that the casual colloquy between himself and the Judge as to his mental state, be stricken from the record; and further, the Court of Appeals held that the defendant had conducted his own defense with a skill and rationality per-

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[6] **Contee v. United States,** 215 F. 2d 324, 328 (C.A.D.C., 1954); **Craig v. Steele,** 112 F. Supp. 153, 154 (W.D. Mo., 1954); **Kitchens v. Steele,** 112 F. Supp. 383, 384 (W.D. Mo., 1953); **United States v. Gundelfinger,** 98 F. Supp. 630 (W.D. Pa., 1951).

[7] **Hill v. United States,** 206 F. 2d 204, 205-206 (C.A. 6, 1953); **O'Connor v. United States,** 203 F. 2d 301, 303 (C.A. 4, 1953); **United States v. Quilop,** 114 F. Supp. 862, 863 (D. Guam, 1953).

[8] **Crabtree v. United States,** 209 F. 2d 164, 165 (C.A. 5, 1953; **Higgins v. United States,** 205 F. 2d 650, 651 (C.A. 9, 1953).

[9] **Wells v. Attorney General of the United States,** 201 F. 2d 556, 557 (C.A. 10, 1953); **Wright v. Steele,** 125 F. Supp. 1, 2 (W.D. Mo., 1954); **Higgins v. McGrath,** 98 F. Supp. 670, 672 (W.D. Mo., 1951).

[10] **Greenwood v. United States,** 125 F. Supp. 777, 778, 779 (W.D. Mo., 1954), **aff'd,** 219 F. 2d 376 (C.A. 8, 1955), **cert. granted,** Oct. 11, 1955, 24 U. S. Law Week 3094, 3114, No. 460 of the Current Term.

mitting no doubt of his mental competence. In *Lebron v. United States,* —— F. 2d ——, the Court of Appeals for the District of Columbia, No. 12,317, decided October 13, 1955, defense counsel making the motion did not say he had reason to believe that the defendant was insane or incompetent; cited no substantive grounds suggesting any such belief, or any such facts; and further, the defendant had in fact been examined by three psychiatrists, prior to trial, at the Government's initiative. The exceptional grounds upon which these two cases rest are persuasive that these Courts would have compelled compliance with Section 4244 under the circumstances at bar.

"This court has twice held that under these provisions [18 U.S.C. § 4244] a motion such as made in this case *must* be granted. *Perry v. United States,* 90 U.S. App. D.C. 186, 195 F. 2d 37 * * *, and *Wear v. United States,* ——U.S. App. D. C.——, 218 F. 2d 24 * * * * " (emphasis added). *Kelley v. United States,* 221 F. 2d 822, 824 (C.A.D.C., 1954). Under 18 U.S.C. § 4244, " * * * the *court* is required to procure a mental examination upon a proper request therefor, and to determine for itself on the basis of such examination whether the accused is competent to stand trial." *Stewart v. United States,* 214 F. 2d 879, 880, n. 1 (C.A.D.C., 1954) (emphasis in original); *Wear v. United States,* 218 F. 2d 24, 27 (C.A.D.C., 1954); *Gunther v. United States,* 215 F. 2d 493 (C.A.D.C., 1954); *Perry v. United States,* 195 F. 2d 37 (C.A.D.C., 1952). While no other Court of Appeals has expressed itself as clearly and precisely on the instant issue as that for the District of Columbia Circuit in these cases, the Eighth Circuit has noted that the psychiatric examination of defendant and the hearing as to his mental competency are "*required* by Section 4244." *Greenwood v. United States,* 219 F. 2d 376,

380 (C.A. 8, 1955), *cert. granted*, Oct. 11, 1955, 24 U.S. Law Week 3094, 3114, No. 460 of the Current Term. (Emphasis added).

There is square conflict between the decisions of the District of Columbia Circuit and the decision below, which is in effect a holding that a motion under Section 4244 may be disregarded, with no real consideration, in the Trial Court's discretion. It is very clear that other Circuits as well have acted on the assumption that the motion must be granted, and that they would have required psychiatric examination of Petitioner upon this motion by the Government.

This issue is squarely before the Court. Petitioner could not and has not knowingly waived his rights to an examination under the statute. Here was a motion made by the Government to vindicate the public policy that questions about defendant's insanity be referred initially to psychiatric examination. It is impossible that such a motion could validly be denied on the theory that defendant, or his counsel, could merely on the basis of their immediate reactions, drawn from them by the Judge's questions, automatically overcome the judgment of the United States Attorney, and the Congressional purpose and public policy enacted in 18 U.S.C. § 4244.

Moreover, even if it were theoretically possible for a defendant whose mental competency is being questioned to waive his right to the psychiatric examination prescribed by Congress, no such waiver can properly be imputed here. The Trial Court, and Petitioner and his counsel as well, all treated the Government's motion summarily. They gave it no real consideration. The Record demonstrates that all were unfamiliar with the statute, and none consulted it.

(R. 795-797). Petitioner and his counsel certainly did not make any knowing and reasoned election; the Court was apparently unwilling to give them an opportunity to do so (R. 796-797), having already advised petitioner's counsel that "we are going to close it tonight. I told you yesterday, we are going to go straight through." (R. 710). They surely should not be held to have waived any substantive rights consciously and deliberately. And the Trial Court made absolutely no inquiry into the issue of waiver; it did not explain Petitioner's rights, nor carefully ascertain that he wished to waive them.

In any event, whatever the position of defense counsel at the trial, the error of the Trial Court is plain and there is express authorization for this Court, and for the Court below, to notice "Plain errors or defects affecting substantial rights * * * although they were not brought to the attention of the court." Federal Rules of Criminal Procedure, Rule 52(b); *Cf.* Revised Rules of the Supreme Court of the United States, Rule 40.1(d)(2); *Wiborg v. United States,* 163 U.S. 632, 658 (1896).

This is an issue having the most fundamental bearing upon the essentials of our criminal law. "The legal and moral traditions of the western world * * * require that where such [criminal] acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility." *Durham v. United States,* 214 F. 2d 862, 876 (C.A.D.C., 1954). "All are agreed that there are conditions, recognized as disease or defect, which in good morals should excuse the afflicted one from criminal responsibility." [11] "If a defendant is not able to under-

[11] Sobeloff, **Insanity and the Criminal Law: From McNaughton to Durham, and Beyond,** 41 A.B.A. J. 793 (1955).

stand the proceedings against him and the nature of the crime with which he is charged, he is not present in court even though his body be there. No trial could be held or judgment pronounced against him under the circumstances." *Flynn v. United States,* 217 F. 2d 29, 30 (C.A. 9, 1954), *cert. den.,* 348 U.S. 930 (1955). The enactment by Congress of 18 U.S.C. § 4244 is "recent affirmation of the ancient principle of law which seeks to avoid the prosecution of an insane person * * *. It formulates a means for avoiding trial or imprisonment for crime of a person of mental incompetency." *Perry v. United States,* 195 F. 2d 37, 38, 39 (C.A.D.C., 1952).

Only this Court can establish the guideposts by which all Federal criminal trials must be administered. Congress has specified a procedure calling for mandatory psychiatric examination when a defendant's mental competence has been questioned by proper motion. In this case, despite a proper motion by the United States Attorney, the Court disregarded the letter and frustrated the spirit of 18 U.S.C. § 4244, by itself determining the issue of the sanity of the defendant—and this upon the defendant's own testimony! This procedure is in square conflict with that required by decisions of other Circuits. The number of cases involving this statute is sufficient to demonstrate the importance of a definitive statement by this Court. The writ of certiorari should be granted.

## II.

This case presents the ever-important issue of the requisites for a "fair" criminal trial, in the context of the Trial Judge's personal reaction to the Petitioner. The Court may have believed that Petitioner was sane, but it certainly did not believe he was normal. The extent to which the Court

directed the jury's attention to Petitioner's personal failings raises the issue of whether the Trial Judge "permitted himself to become personally embroiled with the petitioner" and thus "precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." *Offutt v. United States*, 348 U.S. 11, 17 (1954).

This Trial Judge's personal embroilment took the principal form of ridiculing and mocking the Petitioner. Petitioner has a physical defect which makes it impossible for him to speak clearly (R. 803). This physical handicap was aggravated by his obvious emotional instability as a witness. He was evidently unable to control his testimony; he wandered at great length; he ventured vulgar or foolish opinion. (See, e.g., R. 727, 734, 743, 751, 761-3, 766, 768, 790, 803, 807, 814). It was very easy indeed for the Court to use the Petitioner as a foil against which to demonstrate great superiority in demeanor and wit.

The Record of this trial shows numerous notations of "(Laughter)", provoked by the Court at the Petitioner's expense. When Petitioner apologized at one point, "Yes, sir, I'm sorry I'm excited", the Court mocked, "He says he's a little excited. He says he's a little excited." At this "(Laughter)." (R. 730). A little later, the Petitioner asked, "Am I doing wrong now?"; again the Court echoed, "* * * he says, 'Am I doing wrong?' "; and again the presumably intended response from the audience— "(Laughter)." (R. 734).

Further, the Court revealed its personal involvement against Petitioner when it told the jury, "He is telling me that he thinks I am right, for the moment." Again, "(Laughter)." (R. 765). And the Court was alert to

focus the jury's attention on some of Petitioner's more careless utterances. "He said they [policemen in Houston] have to pay for their beer and coffee. He won't let them accept it free." (R. 751). "He said he doesn't believe in fee splitting." (R. 810). On one occasion, the Court cracked, "Blonds are allergic to everything"; then interrupted Petitioner to continue, "Probably allergic to water * * *." And when this drew "(Laughter)", the Petitioner asked "May I tell a joke too?"; and at this point the Court told Petitioner to answer the question. (R. 739-740).

Incidents like these, even when fewer in number, inevitably tend to dominate the jury's reaction to the defendant and to the issues being tried. "It is obvious that under any system of jury trials, the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). Convictions have been reversed because a Court of Appeals believed the jury may have been swayed by the "intonations and gestures" of the Trial Judge, *Billeci v. United States*, 184 F. 2d 394, 402 (C.A.D.C., 1950), or by "his facial expressions." *Butler v. United States*, 188 F. 2d 24, 25 (C.A. D.C. 1951). When the Trial Judge as actively mocked and ridiculed Petitioner as he did in this case, it is difficult to believe that the jury considered Petitioner a normal human being. This jury may well have found Petitioner guilty of being a negligible of ridiculous human being, rather than of the acts charged in the indictment.

This issue received short shrift from the Court below. Without explaining its disregard of the incidents exemplified above, the Court declared that "A careful examination of the record as a whole does not support the charge

* * * that the trial judge was inconsiderate of appellant's emotional state at the trial and created an unjudicial atmosphere in the courtroom." (R. p. 51 of opinion); *McBride v. United States*, 225 F. 2d 249, 255 (C.A. 5, 1955).

If Petitioner had normal powers of speech and of emotional self-control—in short, if he and his testimony had not been so extraordinary that they prompted the Government in good faith to move the Court that Petitioner be given a psychiatric examination—this case would present only the issue of whether the Trial Court accorded him the treatment minimally due a normal defendant. While we respectfully submit the decision below cannot be sustained even on this basis, we believe that this case poses the further issue of whether a Federal Trial Judge is not required to take extraordinary care in conducting a criminal trial, when the defendant is extraordinary. The Trial Judge "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct * * *." *Quercia v. United States*, 289 U.S. 466, 469 (1932). When a defendant has physical impediments or psychological defects, the Trial Judge should be required so to govern the trial that the jury disregards the defendant's personal defects and weighs the case on its merits. In this case, the Court should have cautioned the jury not to be moved by Petitioner's agitation and imbalance, but to concentrate exclusively upon the issues. The Court should have accorded Petitioner an extra measure of patience and protection. Unless this exacting standard is enforced, there must always be doubt that the conviction of any defendant whose conduct is unorthodox and strained was the result of such extraneous considerations, and is basically improper and unjust.

These issues are of fundamental importance in all criminal trials. This Court should exercise its "supervisory authority over the administration of criminal justice in the federal courts," *McNabb v. United States*, 318 U.S. 332, 341 (1943), in order to define and enforce the Trial Court's duty under circumstances such as those at bar. It should be made clear that there is never any warrant for judicial ridiculing and mocking of a defendant. This Court should grant certiorari, and review this issue to insure that this trial was fair, and also that the conduct of the Trial Judge was demonstrably fair to Petitioner. For " * * * to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14." *In Re Murchison*, 349 U.S. 133, 136 (1955).

## III.

The Harrison Narcotics Act exempts from its record-keeping requirements drugs dispensed by a licensed physician "in the course of his professional practice only * * * to a patient upon whom such physician * * * shall personally attend." 26 U.S.C. 2554(c)(1). The scope of this exemption, an issue of importance in all narcotics cases in which physicians are defendants, and an issue which requires clarification and guidance from this Court, is presented in this case.

On its face, the exemption extends to every prescription of drugs by a licensed doctor, for a person with whom he is maintaining a physician-patient relationship. The statutory language covers every prescription of drugs which is dictated by a doctor's own professional judgment, in the course of what he regards as his professional practice and his personal treatment of his patient. It would seem obviously unreasonable to declare that Congress made the

exception dependent upon whether the doctor was right or wong in his professional judgment, or whether his treatment was good or bad, or his habits of practice the same as the average when compared with the rest of his profession. The only ultimate test established by Congress is the intention of the doctor towards his patient.

On this Record, the jury, had the Court correctly applied the statute, must necessarily have found that Petitioner's prescriptions of this drug did meet this statutory test. Long before the events at bar, he had established a genuine physician-patient relationship with the individual for whom he prescribed these drugs (R. 638-640, 644, 647, 650, 654, 715-726). Petitioner's uncontradicted testimony is that he believed these prescriptions helped, and also did not harm, his patient. (R. 746, 769, 776). The patient shared that belief. (R. 18, 654, 655). Petitioner believed that codeine was non-addictive generally, a belief currently shared by other doctors and only recently the standard judgment of the medical profession. (R. 353, 769, 771, 776, 779). There is nothing in the Record suggesting that the patient was not benefited, in fact and in Petitioner's professional judgment.

Petitioner's prescriptions so obviously fall within the statutory exception that he could not possibly have been convicted, under the proper interpretation of the law. Instead of applying the statutory touchstone of personal professional practice, the Trial Court adopted the exactly opposite criterion. It emphasized "standard medical practice", and virtually made it the only test. The Court summarized its charge on this point as follows: "[petitioner's] right to prescribe is subject to the limitations, as I have told you, that it must be done in accordance with recognized, stand-

ard medical practice." (R. 859).[12] In effect, the Trial Court directed the jury to find the Petitioner guilty if it found that his treatments and prescriptions were not in accord with "standard medical practice." This turnabout of the statute was confirmed by the Court below. It held " * * * that the statutory exception from record keeping did not apply to the giving by the appellant of codeine in quantities exceeding the amounts approved by any of the medical witnesses and regarded by most as greater than justified by standard medical practice." 225 F. 2d at 252 (R. p. 44 of opinion).

This decision raises issues of general importance to the interpretation of the Narcotics Act, the criminal law generally, and the public interest in progressive and individualized medical practice. Under the decision below, a doctor who prescribed drugs, according to his own best professional judgment, in complete good faith, and who thereby succeeded in curing the disease, without any ill effects, could not rely upon the statutory exemption from keeping records on the use of those drugs. His understanding of the purpose and efficacy of the treatment would not be sufficient, according to the Court below; he had better know for a fact

[12] While the Trial Court also used the phrase "good faith", it obviously subordinated this concept to, or at the most equated it with "standard medical practice". It instructed the jury that the test of the statutory exemption was whether the dispensations of the drug were made "in good faith and according to the standard medical practice" (R. 857); by a doctor "acting within the recognized standard medical practice * * * and in good faith" (R. 858). Finally, after the definite summary quoted in the text, focusing the jury's attention solely upon "recognized standard medical practice" (R. 859), the Court did make passing final reference to other standards. (R. 860). Taking this charge as a whole, the jury must have considered that the single pertinent test for resolving the applicability of the exemption, and thereby necessarily determining Petitioner's guilt or innocence, was "standard medical practice".

that his treatment is by the book, without deviation from the standard professional line. The problem involved is the ultimate factual issue which the jury must resolve: Is the physician exempt from the record keeping requirements (and therefore innocent of the charges) so long as he has professionally believed the drugs would be helpful in his personal treatment of a patient; or is he exempt only when his treatment accords with "standard medical practice"? It is not a question of what evidence the jury may consider, but of the ultimate finding they are required to make under the evidence.

This is apparently the first case in which a physician has been convicted for prescriptions which he himself believed were helpful and non-addictive, and which were made in the course of practice and treatment of a genuine patient. Whatever the expressions in other cases, they have apparently all been addressed to wholly different fact situations. Typically, there has been no colorable trace of a genuine relationship of physician and patient. Regardless of the defendant's testimony in those cases, he is obviously not engaged in the practice of his profession and attending one of his patients when he makes no medical examination or diagnosis and engages in no treatments,[13] and is making drugs available to those who are not his regular patients;[14] when he gives no instructions as to the use of the drugs;[15] when he is passing the drug surreptitiously in an isolated quarter, at night;[16] or when it is proved that the

[13] **United States v. Lindenfeld,** 142 F. 2d 829, 830 (C.A. 2, 1944), **cert. den.** 323 U.S. 761 (1944); **United States v. Brandenburg,** 155 F. 2d 110, 162 F. 2d 980 (C.A. 3, 1946, 1947).

[14] **Ibid.; United States v. Abdallah,** 149 F. 2d 219 (C.A. 2, 1945), **cert. den.** 326 U.S. 724 (1945).

[15] **Ibid.; Moore v. United States,** 128 F. 2d 887 (C.A. 5, 1942), **cert. den.** 317 U.S. 629 (1942).

[16] **Moore v. United States, supra.**

drug is ultimately intended for a known addict[17] or for the physician himself.[18]

To convict a physician without such proofs of his own state of mind, and to rely exclusively upon the objective contrast with "standard medical practice", raises issues of importance in the criminal law generally. This criterion is vague and shifting; it cannot be definitely anchored to place, time, text, or other authority. A particular physician may not know what the consensus on "standard medical practice" is in a particular case; and he certainly will be unable to have it specified in advance. The jury is free to disregard his own protestations of good faith, solely on the testimony of some other doctors that, with hindsight, they would have treated the case differently. This is obviously unfair. There must be grave doubt that Congress intended such a standard; and if it did, that such a standard of criminality is clearly constitutional.

An additional constitutional problem is posed by the fact that this standard lends the force of the administration of Federal law to moulding all professional practice to fit the "standard" pattern. This Court has consistently held that the Federal Government cannot directly regulate medical practice, and that the Harrison Narcotics Act can be held constitutional only as a revenue measure. *Nigro v. United States*, 276 U.S. 332, 341 (1928); *Alston v. United States*, 274 U.S. 289, 294 (1927); *Boyd v. United States*, 271 U.S. 104 (1926); *Linder v. United States*, 268 U.S. 5, 18 (1925); *United States v. Doremus*, 249 U.S. 86 (1919); *United States v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916).

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[17] **United States v. Lindenfeld, supra; United States v. Abdallah, supra; United States v. Brandenburg, supra.**

[18] **United States v. Tommasello**, 160 F. 2d 348 (C.A. 2, 1947).

It is difficult to believe that Congress intended to affect medical practice in this way. It seems obvious that the public has an interest in having the medical profession be free to prescribe drugs to patients under many circumstances when the doctor may know he is departing from "standard medical practice".

Experimental and pioneering treatments are not the only example; the family doctor who knows his patients so well, as individuals, should be free to prescribe drugs in an unorthodox manner; the physician who has an apparently incurable case, or must decide how to treat very quickly or under unfavorable circumstances, should be free to proceed without certainty, in doubt and in hope. The concept of "standard medical practice" should not be held decisive in such cases, as a matter of public policy.

Issues of general importance are thus involved in whether this Act can or should be so construed as to make the medical exemption dependent solely upon "standard medical practice". This interpretation, which made Petitioner's conviction possible, is unwarranted by the statutory language, the prior sustained convictions, the decisions of this Court on the constitutionality of this Act, and public policy. The issue is of continuing vitality, so long as doctors are indicted under the Narcotics Act. To resolve this issue, this Court should grant certiorari.

IV.

The nature of criminal intent is presented as an issue in this case. Petitioner was convicted under statutes which made criminal the keeping of false records, "willfully" or "fraudulently". The Trial Court instructed the jury that "it is not necessary that the Government prove that the Defendant in fact had an evil intent * * * wilfully—that

is deliberately—and voluntarily * * * " (R. 854, 862). This was affirmed in the Court below, on the theory that *United States v. Murdock*, 290 U.S. 389, 394 (1933), which held that "willfully", in a tax context, " * * * generally means an act done with a bad purpose * * * " need not be followed "in a case such as we here consider." (R. ). This issue is of general importance; there is need for this Court to establish clearer guideposts for the substantial and increasing number of criminal cases involving wilfulness and fraudulent intentions.

This is not a case where the defendant has been proved a principal in a continuing criminal conspiracy to perform acts which are very clearly and obviously violative of the prime purpose of a statute. There is no drug ring involved; no addicts; no criminal organization; no attempt to impede the Government.

In dispensing codeine to the single patient involved in this case, Petitioner kept certain records. We have urged in III above that he clearly was not obligated to keep these records, because he was personally attending this patient in the course of his professional practice. Evidently Petitioner was not certain whether or not the Government would one day contend that he was required to maintain these records. That was the kind of person Petitioner was; and the myriad regulations of contemporary life naturally leave all but the most self-assured with some portions of doubt as to exactly what records and reports must be maintained. Whatever his purpose, Petitioner did not show on certain entries the name "L. D. Morrison", which was the name of the patient who received the drug; but instead, Petitioner put the name of another of his patients, "Billy Jackson".

This sole irregularity in his records had neither the purpose nor the effect of misleading any Government official

or department. Petitioner's records were not submitted to the Government, nor were they the basis of any action, either by him or by the Government. Such records, when required under the Act, must simply be maintained and be available to a Government inspector whenever he chooses to inspect them. That moment came in this case, and when it came, Petitioner immediately and fully disclosed the facts. (R. 63-66, 75-79, 130-134, 143-146, 156-159, 168, 190, 192, 203-205, 216, 217-219, 790-791, 797-801, 812-813). No one ever took the "Billy Jackson" in the entries at bar actually to mean "Billy Jackson". The Government lost nothing, apparently not even time, because of the private code or symbols used by Petitioner. No public function or program was impeded or obstructed.

These facts, uncontradicted on the Record, demonstrate that the Court below could not have affirmed Petitioner's conviction, except by holding that criminal intent was not an essential element. The Court of Appeals recognized that its position was in direct conflict with the holding of this Court in *Murdock v. United States*, 290 U.S. 389 (1933). But it shunted *Murdock* aside with the unexplained conclusion that *Murdock*, and the Court of Appeals decisions which have followed it "involved willful income tax evasion * * * It is not applicable in a case such as we here consider." (R. pp. 49-50 of the opinion), 225 F. 2d 249, 254. This conclusion is obviously in error, unless this Court itself overrules or modifies *Murdock* and its decisions on the Narcotics Act.

This Court has always held that the Narcotics Act is a tax statute, an internal revenue measure, and indeed has held that its constitutionality depends on so regarding it. See cases cited, *supra* (p. 27, this petition). To attempt to

evade the Narcotics tax, by falsifying records, is no different from a willful attempt to evade the income tax or any other Federal tax. On this inescapable proposition, the decision below falls. There is no good reason for denying this Petitioner the protection of the *Murdock* holding.

The statutes before this Court in *Murdock* provided criminal penalties for anyone who "willfully" failed to supply information for the computation of taxes under particular Revenue Acts. In establishing standards for the application of "willfully", the Court was thus faced with issues very similar to those presented here, and the Court's opinion dealt with the extent to which evil motive must be an element of the crime of wilfully failing to provide, or falsifying information to be used by the Government in collecting taxes and administering the revenue laws.

For such crime, this Court held that the word "willfully" " * * * when used in a criminal statute * * * generally means an act done with a bad purpose * * *" 290 U.S. at 394. And it expressly declared that " * * * where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the Act declares a willful failure to observe the directions a penal offense, *an evil motive is a constituent element of the crime* * * *" (emphasis added). 290 U.S. at 395. The *Murdock* case has been consistently followed in cases involving obligations under the Internal Revenue Code.[19] This Court should require that *Murdock* be followed in this case.

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[19] **Spies v. United States**, 317 U.S. 492, 498 (1943); **Bloch v. United States**, 221 F. 2d 786, 789 (C.A. 9, 1955), **rehear. den.** 223 F. 2d 297 (C.A. 9, 1955); **United States v. Martell**, 199 F. 2d 670, 672 (C.A. 3, 1952).

Further, there is need to review the propriety of the no-evil-intent holding under each of the three different fraudulent entry statutes under which Petitioner stands convicted. These are the general false claims act, 18 U.S.C. § 1001; the forging of official records provision, 18 U.S.C. § 494; and the fraudulent tax records section, 26 U.S.C. § 3793.

A. Under 18 U.S.C. § 1001, Petitioner was convicted of "knowingly and willfully" making these narcotics records "knowing the same to contain any false, fictitious or fraudulent statement or entry * * *." To bolster its holding that evil intent was not a necessary element for the crime of violating this statute by false entries on narcotic records, the Court below relied on *Walker v. United States,* 192 F. 2d 47, 49 (C.A. 10, 1951), and also cited *Mitchell v. United States,* 143 F. 2d 953 (C.A. 10, 1944), and *United States v. Tommasello,* 160 F. 2d 348 (C.A. 2, 1947). The brief discussions of this point in these cases are neither persuasive nor definitive, and are necessarily only dictum. The actual facts in each of these cases did obviously demonstrate an evil criminal intent on the part of the defendant, a wholly different situation from that at bar.

In *Walker,* the defendant, an addict, deliberately gave a wrong address to a physician, in order to obtain a prescription for drugs, which she herself then obtained for her own use. The prescription was obtained, and was honored, only because of the falsehood. Telling the truth would have prevented the defendant from obtaining the drugs. At no time did the defendant disclose the full truth. In the present case, however, no action was induced or changed by Petitioner's entries. Petitioner would have dispensed the same amounts to his patient in any event; as soon as the records were put before another person, the Government inspector, the Petitioner did relate the complete truth.

In *Mitchell* and *Tommasello,* the defendants were doctors. But that is the end of any similarity to this case. There was no colorable showing of a genuine physician-patient relationship. Mitchell sent the drugs through the mails, in response to nothing more than mail requests, to "so-called patients" (143 F. 2d at 957), whom he had never seen and whose medical condition he of course could not have known. Tommasello did not intend the drugs for another; he consumed them himself. In each of these cases, the defendant certainly knew that the name he was entering as a patient recipient of the drug was no patient at all. There was no full and prompt disclosure of the truth in either case.

Because of these vital differences from the instant case, the sole authority relied on below cannot be accepted as disposing of the issue of whether an appropriate interpretation of 18 U.S.C. § 1001 liberates the Government from its burden of proving evil intent, purpose to defraud, when the facts are as overwhelmingly probative of lack of intention to violate law as they are in this case.

B. Under 18 U.S.C. § 494, Petitioner was convicted of "falsely" making these written records "for the purpose of defrauding the United States." Apart from the admitted fact that Petitioner deliberately and voluntarily performed the act of writing "Billy Jackson" when he gave drugs not to Billy Jackson but to L. D. Morrison, there was no evidence which showed any purpose to defraud the United States. The record demonstrates the contrary, as above noted: the actual facts were immediately and fully disclosed to the Government, and neither the Government nor anyone else took any different action whatsoever because of this irregularity. The jury could not possibly have found a purpose to defraud, under proper instructions.

The instructions to the jury in this case actually removed this issue from the jury's consideration, and in effect directed the jury to find that Petitioner had a purpose to defraud. The charge did not discuss the words, "for the purpose of defrauding the United States", which do appear in the statute. Instead, it defined "knowingly and wilfully". (R. 861, 862). These words were used in the indictment, which the Court may have been using as its text; but they cannot be found in the legislation, which alone authorizes conviction.

The Court defined "knowingly and wilfully" as meaning only "deliberately and voluntarily" (R. 862). And it had already expressly directed the Jury that to prove wilfulness, "it is not necessary that the Government prove that the Defendant in fact had an evil intent." (R. 854). This plainly meant that the Jury should convict if it found that Petitioner deliberately and voluntarily did the physical act of writing "Billy Jackson" when it was objectively false that Billy Jackson was the intended recipient of the drugs. The Court directed the jury to disregard the issue of evil intent, of purpose to violate law and to defraud, although the statute itself makes an act a criminal offense only if there is a "purpose of defrauding the United States."

This obvious error was confirmed by the decision below, which declared that the only requirement was that the entry be "deliberately made". (R. 45 of the opinion), 225 F. 2d 252. Like the Trial Court, the Court of Appeals evidently believed "wilfully" and "for the purpose of defrauding the United States" were synonymous, neither requiring an evil purpose. Synonymous we agree they are; but we urge that they both require this element. The jury cannot be instructed that from the doing of an act they can automatically presume its intent and purpose.

Any criminal conviction so ordered by the Court itself, with essential elements of criminality removed from the jury's consideration, must be reversed. This Court established the applicable principles, so casually disregarded below, in *Morissette v. United States*, 342 U.S. 246 (1952).

There, as here, the acts were done deliberately and voluntarily, but evil intent was strenuously denied. There, as here, there was full disclosure, or open dealing, by the defendant. And there, as here, the Trial Court removed the question of intention from the jury's consideration, on the presumption that the purpose to do the acts itself legally established the requisite evil intent, which is here the purpose to defraud the United States, and in *Morissette*, "*wrongfully* to deprive another of possession of property." 342 U.S. at 276 (emphasis in original).

This Court unanimously reversed Morissette's conviction. It held that Congress intended the element of evil motive to be required, even in that statute which did not expressly provide for it; and that this element must be found only by the jury, never by the Trial Court's presumption and instructions. "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. * * * It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. * * * In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." 342 U.S. at 274, 275.

In *Morissette*, this Court clearly drew the distinction between mere intention to perform an act, and evil or criminal intent. That what Morissette did " * * * was a conscious

and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent * * * Whether that intent existed, the jury must determine, [and] not only from the act of taking * * * " 342 U. S. at 276.

The teaching of *Morissette* was clearly not followed by the Courts below. This Court should exercise its supervisory jurisdiction over the administration of Federal criminal justice, by reviewing this conviction, and reaffirming the principles of the *Morissette* case.

In addition to contravening *Morissette*, the decision below is in square conflict with that of another Circuit on the specific issue of whether evil intent is required for a conviction under 18 U.S.C. § 494. While the Court below held evil intent was not so required, the Court of Appeals for the District of Columbia Circuit has expressly held the contrary. *Sullivan v. United States*, 178 F. 2d 723 (C.A. D.C., 1949).

The Trial Courts in both this case and *Sullivan* equated the purpose to do an act with the purpose to defraud the United States. This instruction was affirmed below but reversed in *Sullivan*, on the precise ground that this legislation requires a fraudulent motive. There must be "a purpose to defraud the government by impairing administration of its laws regulating the sale of narcotics." 178 F. 2d at 724. Since a finding of "fraudulent purpose" is "essential" to the crime, it was prejudicial error for the Trial Court " * * * to inform the jury that, in the court's judgment, admitted acts of the defendant established the requisite fraudulent intent. As intent was the vital issue the statement was tantamount to expressing the court's judgment that the defendant was guilty." 178 F. 2d at 725. If

the Court below had adopted this view of this statute, it could not have affirmed the conviction on any basis, and certainly not on the basis that deliberate intention to write "Billy Jackson" for "L. D. Morrison" is conclusive proof, by unexplained equation, of intention to defraud the United States.

The square conflict between the decision below and *Sullivan* can be resolved only by this Court. The issues are of obvious importance, not only to the administration and enforcement of this particular statute, but to the general criminal law.

C. Under 26 U.S.C. § 3793, Petitioner was convicted as having been one who, in these narcotics records " * * * simulates or falsely or fraudulently executes * * * any * * * entry, or other document required by the provisions of the internal revenue laws." The instructions of the Trial Judge turned to this Section after having discussed the other legislation in the terms noted above, having already declared and reiterated that the only intention necessary was the intent to do an act and that there was no requirement of evil motive. At this point, the Judge, in an apparent slip of the tongue, injected the word "feloniously", and did state that "feloniously means with evil intent." (R. 865).[20] But almost immediately thereafter, the Court made clear that the jury could and should convict on the counts grounded on 26 U.S.C. § 3793, if it believed that the drug referred to in Petitioner's records " * * * was dispensed and intended to be dispensed to one Lawrence D. Morrison and not dispensed or intended to be dispensed to the said

[20] On appeal, the point was made that this instruction was prejudicial error in adding a word which did not appear in either the statute or in the indictment. This point, discussed in the opinion of the Court of Appeals, is not being raised in this petition.

Billy Jackson * * *" (R. 865-866). Thus, the instructions to the jury, taken as a whole, remove the element of evil intent, and make conviction automatic, once the physical acts of writing "Billy Jackson" and dispensing to "L. D. Morrison" are admitted.

Such instructions are prejudicial and fatal error under this statute, as well as the others. This statute requires for conviction that the false record be executed "fraudulently". There was no more justification for equating the deliberate intention to perform the physical act of writing the wrong name, with the intention to perform that act "fraudulently", than there is for equating the purpose of doing of that act, with the "purpose of defrauding the United States." For the reasons discussed in connection with 18 U.S.C. § 494, a conviction based upon such reasoning, and the affirmance of such a conviction, are in obvious and direct conflict with the fundamental principles elaborated by this Court in *Morissette v. United States*, 342 U.S. 246, and in conflict with other principles of law. This Court should not withhold its review from such judicial procedures.

## Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX "A"

In The

**UNITED STATES COURT OF APPEALS**
For The Fifth Circuit

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No. 15370

---

JULIUS BASCOM McBRIDE, Appellant,
versus
UNITED STATES OF AMERICA, Appellee

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Appeal from the United States District Court for the Southern District of Texas

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(August 9, 1955)

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Before HUTCHESON, Chief Judge, JONES, Circuit Judge, and WRIGHT, District Judge.

JONES, Circuit Judge: The appellant, Julius Bascom McBride, had been practicing osteopathy in Houston, Texas, for nearly twenty years. Among his patients and friends was L. D. Morrison, who was Chief of Police in Houston during the occurrence of the happenings out of which this appeal arose. Morrison was thrown into an automobile in the latter part of 1951 and this incident or other cause resulted in a back injury, diagnosed as a ruptured intervertebral disc, attended by severe pain. In January, 1952,

he consulted Dr. J. T. Billups, a surgeon, who sent him to a hospital where he was given traction treatment. While in the hospital he was given narcotics of one kind or another, including codeine combined with other drugs for relieving pain. Surgery was discussed but Morrison would not agree to it.

Soon after being discharged from the hospital, Morrison went to appellant who sent him to another osteopath for X-ray treatments, from which he had a reaction. For the relief of the condition created by the X-ray the appellant used nembutal and pantopon, neither of which was entirely satisfactory. The appellant then tried codeine. The effect of the initial use of this drug was described by the appellant in these words: "the next morning everything was lovely. Oh, everything was lovely, and so the next day, I thought, 'Boy, we better do that again' . . .". The appellant then began prescribing codeine in combination with other drugs, later changing to direct dispensing from appellant's office of "codeine straight", as it was described by him.

During 1953, 215 grains of codeine by prescription and 671 grains, or more, by direct dispensation were received by Morrison from appellant. During the first four and a half months of 1954 appellant dispensed directly to Morrison not less than 800 grains of codeine, some of which was delivered a hundred grains at a time. In appellant's narcotic record book, which appellant was required to keep, the name of Morrison was erased and the name of Billy Jackson, an incurable cancer patient of appellant, was substituted. The appellant's reason for so doing as given to the Federal Narcotics Agents was that Morrison had objected to his name being inserted in the record. At the trial appellant thought perhaps Morrison had not expressed an objection

but he had ascertained Morrison's objections by reading his mind. Upon being confronted by the Narcotics Agents with these entries, which appellant's counsel at the trial admitted were false, the appellant readily admitted the name Billy Jackson was used in lieu of Morrison's name to show the destination of the drug dispensed. He then and at the trial contended the Billy Jackson entries were merely a code "like John Doe". He testified that when one of the agents "asked me for my narcotic record, my books, I knew I had better explain it to him immediately because, well, like I say, I knew my wife had fussed at me about handling these people, and I thought I had better say it ahead of time, because I knew it was a hell of a mess . . .".

The appellant and his wife were both constantly concerned about the dispensing of such large quantities of a narcotic to Morrison. He frequently expressed to Morrison his fears that his patient was or was becoming an addict, and on various occasions he attempted to get Morrison to discontinue the use of codeine. Appellant's wife urged him to stop dispensing the drug to Morrison. The appellant attempted to justify his conduct to himself by the belief, or perhaps hope, that the dispensing of narcotics when accompanied by treatment was not illegal. He therefore gave Morrison an osteopathic treatment upon each occasion of dispensing codeine and followed the same procedure with others.

The appellant was indicted in twenty-six counts, odd numbered counts 1, 3, 5, 7, and 9 charging false and fraudulent entries in the appellant's record of dispensation of narcotics, under 18 U.S.C.A. § 1001, counts 11, 13, 15 and 17 charging the false making, altering, forging and counterfeiting of the narcotics records, under 18 U.S.C.A.

§ 494, counts 19, 21, 23 and 25 charging false and fraudulent execution of entries in the narcotics record, a document required by the Internal Revenue Laws and Regulations, under 26 U.S.C.A. § 3793, and the even numbered counts charging that appellant sold, dispensed and distributed narcotics not in the course of professional practice, not for legitimate medical purposes, and not in good faith, under the Harrison Act, 26 U.S.C.A. §§ 2550, 2554. Prior to the trial, the appellant filed (1) a motion to dismiss the indictment upon the ground, among others, that the indictment was based upon the testimony, unwillingly given, of appellant's wife, (2) a motion for a bill of particulars, (3) a motion to inspect the Grand Jury minutes, and (4) a motion for the return of and suppression as evidence of seized property. The motion to inspect was granted. The other motions were denied. Application was made to transfer the case from the Houston Division because of the publicity the case had received. The cause was transferred to and the trial held in Corpus Christi. At the close of the testimony, a motion was made by appellant for a directed verdict. The motion was denied. The jury returned a verdict of guilty on all counts. A motion for a new trial was denied.

The appellant urges before this Court, at the outset, that the indictment is defective. The appellant's wife appeared before a Grand Jury which indicted appellant. This indictment was dismissed. A subsequent Grand Jury returned the indictment upon which appellant was tried. Appellant says in his brief that although appellant's wife did not appear before the second Grand Jury, it used the minutes of the prior Grand Jury in which her testimony appeared. There is nothing before us that shows that the testimony of appellant's wife before the 1st Grand Jury was trans-

cribed or that the second Grand Jury had any access to or knowledge of her testimony. Counsel who presented the case to the Grand Jury for the Government and who tried the case in the District Court deny that the minutes of the former Grand Jury were in any way used by or before the body which returned the indictment. We need not consider the effect of something which is not shown to have occurred.

The appellant contends that he was not required to keep records of the narcotics dispensed to Chief Morrison, that if required to keep records he was justified in believing otherwise and in acting on his belief, that the records as kept by him fulfilled the statutory requirements, that the codeine given was dispensed in the course of the legitimate practice of his profession, that the Court's charge was erroneous and prejudicial, and finally, that the Judge, by remark and comment, created an unjudicial atmosphere in the courtroom.

The Harrison Act levies a tax upon the importation and sale of designated narcotics and narcotic compounds and derivatives. 26 U.S.C.A. § 2550. Codeine is included. It is provided that:

> "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."
>
> "Nothing contained in this section . . . shall apply—
>
> "To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner, registered under section 3221, in

> the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner, shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner, shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.
>
> "To the sale, dispensing, or distribution of narcotic drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner, . . ." 26 U.S.C.A. § 2554.

Violations are criminal offenses and penalties are provided. 26 U.S.C.A. § 2557, 18 U.S.C.A. § 1001.

Because the appellant gave to Morrison an osteopathic treatment on each occasion when codeine was dispensed, it is urged that the drug was given "to a patient upon whom such . . . practitioner shall personally attend", and being so given the record was not required. We need not risk restricting the meaning of the phrase "personally attend" by a definition. It is enough to say that the evidence justified the findings by the jury as an incident to its verdict of guilty that the statutory exception from record keeping did not apply to the giving by the appellant of codeine in quantities exceeding the amounts approved by any of the medical witnesses and regarded by most as greater than justified by standard medical practice. The appellant was asked if it was his understanding that he had a legal right to dispense. He testified that Police Chief Morrison had brought him a book

on narcotics "and it says plainly there 'when personally—when you are in personal attendance or personally administered by the doctor, you don't even have to keep a record of it.' It says very plainly." That which appellant would have us say was an honest misunderstanding obviating criminal intent might well be regarded as subterfuge and evasion.

That the records kept were not in compliance with with the statute seems so obvious as not to call for comment. The desire of Chief Morrison to have his name erased from a narcotics record does not justify the substitution of the name of Billy Jackson, an incurable cancer patient, as the person receiving the narcotics which were dispensed to Morrison. Particularly is this true when the appellant had so much concern as to whether Morrison was becoming or could become an addict as appears from the testimony. The code, so called, was merely the appellant's record of office calls and payments. It is unconvincing as a means of determining the quantity of codeine dispensed to either Morrison or Jackson. The prompt admission of the falsity of the record to the Narcotics Agents was more likely induced by the appellant's realization, as he put it, that "I had better say it ahead of time, because I knew it was a hell of a mess . . ." rather than by the guileless explanation of one innocent of wrongful thought or deed. The entries made by or at the direction of appellant in the record which he was required to keep and which he knew he was required to keep were false and known by him to be false. Such falsification of the record, deliberately made, is an offense of which appellant was charged under the odd numbered counts of the indictment and for which he has been adjudged guilty.

It has already been noted that none of the professional witnesses, four of whom were called by the Government, one of these being an osteopath, and two called by the defendant, would say that the dispensing of codeine in the quantities given by the appellant to his friend and patient Morrison was standard medical practice. Evidence of the failure to follow standard medical practices shows a lack of good faith. So also, as bearing on good faith is the evidence of appellant's unorthodox attitude toward narcotics and addiction.

Without detailing this evidence we mention as examples excerpts from appellant's testimony:

> "You can take morphine, you can take codeine, you can take anything at all without being an addict. Just because you drink whiskey is no sign you are a drunkard, and about the only people who become addicts are weaklings."

Also, quoting Morrison,

> ". . . and so he says, 'Gosh', says, 'you know I don't like for people to know—if people knew I was taking this codeine, they would think I wasn't able to hold this job,' and I said, 'Gosh, that's what makes you good. If you didn't have the stuff, you couldn't hold your job.' "

And

> "I took pantopon every day, two or three times a day, for six weeks to two months, and, boy, I love that stuff, boy, its heaven, pantopon is heaven, it's wonderful, but I tell you what, I wouldn't take that stuff because I'm scared of it . . ."

The appellant contends that the charge of the Court as to standard medical practices and good faith injects

elements of the offense which are not within the statute. This instruction of the Court was:

> "If dispensations were made in good faith and according to standard medical practices in the cure of disease or injury, and not merely to satisfy the craving of a person for such drug, then the dispensations may be said to have been made in the regular course of the defendant's professional practice only; but if the dispensations were not made in good faith, but were made to enable such person to obtain codeine sulphate to satisfy his appetite or craving for such drug only and not in the treatment of his patient, then the dispensation of such drug would not be in good faith nor in the regular course of the defendant's professional practice as a physician, nor for legitimate medicinal purposes, and such sale and dispensing would not be lawful."

The foregoing portion of the Court's charge is almost identical with a portion of an instruction approved in *DuVall v.* United States, 9th Cir. 1936, 82 F. 2d 382, Cer. den. 298 667, 56 S. Ct. 751, 80 L. Ed. 1391. The instruction above quoted accurately states the law of this aspect of the case as announced by the Supreme Court. *Linder v. United States,* 268 U.S. 5, 45 S. Ct. 446, 69 L. Ed. 819, 39 A.L.R. 229; *Boyd v. United States,* 271 U.S. 104, 46 S. Ct. 442, 70 L. Ed. 857. The belief of appellant that the codeine dispensed was beneficial to Chief Morrison in "making him good" and "holding his job", if such belief was sincerely held, does not establish good faith nor alter criteria of standard medical practices.

The trial judge, in the instructions to the jury, made reference to the words "knowingly and willfully" as used in 18 U.S.C.A. § 1001, and in the counts numbered 1,3,5,7, and 9, of the indictment charging false and fraudulent record entries, saying:

> ". . . and the word knowingly means with knowledge—and wilfully—and wilfulness is an element of the offense charged and is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully and knowingly made a false record or entry; to prove this element it is not necessary that the Government prove that the Defendant in fact had an evil intent. The word wilful means no more than that the forbidden act is done deliberately and with knowledge."

The appellant, claiming that evil intent was necessary, cites an opinion of the late Justice Roberts as follows:

> "The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose [citing cases]; without justifiable excuse [citing cases]; stubbornly, obstinately, perversely, [citing cases]. The word is also employed to characterize a thing done without ground for believing it is lawful [citing cases] or conduct marked by careless disregard whether or not one has the right so to act [citing cases]." United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381.

Appellant also reminds us of that which Chief Judge Hutcheson observed, in an opinion reversing a judgment of conviction for willful tax evasion:

> "The Court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing.
>
> ". . . In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obli-

> gation and a wrongful intent to evade it, is of the essence." Hargrove v. United States, 5th Cir. 1933, 67 F. 2d 820.

The appellant also calls attention to the following recent statement of this Court speaking through Judge Rives:

> "It is now settled that 'willfully' . . . means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual *bona fide* misconception of the law, such as would negative knowledge of the existence of the obligation, would, if believed by the jury, justify a verdict for the defendant." Wardlaw v. United States, 5th Cir. 1953, 203 F. 2d 884.

It is to be noted that in the Murdock case, *supra*, the Supreme Court said that in arriving at the meaning of the word "willfully" aid must be afforded by the context. 290 U.S. 389, 395. In the Hargrove case it is pointed out that "willfulness" is largely a matter of intent which arises when someone willfully or intentionally does that which is unlawful. 67 F. 2d 820, 823. In the Wardlaw case it is to be emphasized that the definition of "willfully" as there used was restricted by the words "as used in this offense", which words follow "willfully" in the first line of the language quoted and were deleted from appellant's quotation of the definition in his brief. 203 F. 2d 884, 885.

We think Judge Learned Hand spoke well when he said:

> "The word 'willful', even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." American Surety Co. v. Sullivan, 2d Cir. 1925, 7 F. 2d 605, 606.

"The meaning of the word [willful]", says the Court of Appeals for the District of Columbia, "depends in large measure upon the nature of the criminal act and the facts of the particular case. It is only in very few criminal cases that 'willful' means 'done with a bad purpose' ". *Townsend v. United States*, U.S.C.A. Dist. Col. 1938, 95 F. 2d 352, 358; *Fields v. United States*, U.S.C.A. Dist. Col. 1947, 164 F. 2d 97, 100.

The Murdock case, the Hargrove case, and the Wardlaw case, cited *supra*, involved willful income tax evasion and the definition of "willful" stated in those cases may be followed and applied in like cases. It is not applicable in a case such as we here consider. That the Murdock case is not of universal application appears from *Browder v. United States*, 312 U.S. 335, 61 S. Ct. 599, 85 L. Ed. 862, where it was said:

> "Read in its context the phrase 'willfully and knowingly', as the trial court charged the jury, can be taken only as meaning 'deliberately and with knowledge and not something which is merely careless or negligent or inadvertent'." 312 U.S. 335, 341.

We are not without precedent for the meaning of "willfully" as used in the statute before us [18 U.S.C.A. § 1001] as applied to the falsification of narcotic records. In a recent Tenth Circuit case the same point was raised and was thus disposed of:

> "Wilfulness is an element of the offense charged and it was necessary for the Government to prove beyond a reasonable doubt that appellant wilfully and knowingly gave a false and erroneous address. To prove this element, it was not necessary, however, as contended by appellant, that the Government prove that she had in

> fact an evil intent. In some penal statutes the word 'wilful' connotes moral turpitude or evil of mind, but in others it means no more than that the interdicted act is done deliberately and with knowledge. We think that clearly is the sense in which the term is used in the statute under which the charges in the three counts of the indictment are laid." Walker v. United States, 10th Cir. 1951, 192 F. 2d 47, 49. See also Mitchell v. United States, 10th Cir. 1944, 143 F. 2d 953; United States v. Tommasello, 2d Cir. 1947, 160 F. 2d 348.

The Court properly instructed the jury as to the meaning of "willfully".

In the Court's instruction on counts 19, 21, 23 and 25 which charged violations of 26 U.S.C.A. § 3793, it was said:

> "One Julius Bascom McBride . . . did unlawfully, knowingly and *feloniously—feloniously* means with evil intent . . ." [Emphasis supplied].

The word "feloniously" does not appear either in the statute or the indictment. The Court's interjection did no more than impose an additional burden upon the Government and the appellant was not prejudiced. The appellant made no objection to that portion of the instructions and cannot be heard to raise it now. Fed. Rules Crim. Proc., Rule 30, 18 U.S.C.A.

The appellant tells us that the trial judge was inconsiderate of appellant's emotional state at the trial and created an unjudicial atmosphere in the courtroom. A careful examination of the record as a whole does not support the charge.

In appellant's reply brief he asserts the belief that the Harrison Narcotic Act requires new judicial interpretations to make it conform to constitutional requirements. The Act has many times been upheld against attacks on constitutional grounds. There is no need to extend this opinion by a citation of authorities supporting the constitutionality of the Act. The early and leading cases are discussed in the A.L.R. annotation to *Linder v. United States*, 268 U.S. 5, 45 S. Ct. 446, 69 L. Ed. 819, 39 A.L.R. 229.

Other matters which appellant has urged and argued in his brief have not been overlooked, but are without substance or merit and require no comment on our part.

The judgment is AFFIRMED.

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A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

## APPENDIX "B"

### Statutes Involved

Tit. 18, § 4244. *Mental incompetency after arrest and before trial*

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the ac-

cused is mentally compeent to stand trial shall in no way prejudice the accusd in a plea of insanity as a defense to the crime chrged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. Added Sept. 7, 1949, c. 535, § 1, 63 Sta. 686.

Tit. 26, § 2554. *Order forms—(a) General requirement*

It shall be unlawful fo any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written orde of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

*(b) Exception in case of Virgin Islands.* The President is authorized and directed to issue such Executive orders as will permt those persons in the Virgin Islands of the United States lawfully entitled to sell, deal in, dispense, prescribe, and distribute narcotic drugs, to obtain said drugs from persons registered under section 3221 wthin the continental United States for legitimate melical purposes, without regard to the order forms described in this section.

*(c) Other exceptions*

* * * * * * * * * * * * * *

*(1) Use of drugs in professional practice.* To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner, registered under section 3221, in the course of his profesional practice only: *Provided*, That such physician, dentist, veterinary surgeon, or other practitioner, shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner, shall personally attend; and such record shall be kept for

a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.

(2) *Prescription.* To the sale, dispensing, or distribution of narcotic drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner, registered under section 3221: *Provided, however,* That (1) such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner, who shall have issued the same; (2) that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

In lieu of a written prescription for such narcotic drugs or compounds of a narcotic drug which the Secretary, in his discretion (after considering any views expressed on the subject by the Surgeon General, United States Public Health Service; the Commissioner, United States Food and Drug Administration, the respective heads of State narcotic law enforcement agencies, and the respective secretaries of national associations representing (a) narcotic drug manufacturers, (b) physicians, and (c) pharmacists), shall find and by regulation designate to possess relatively little or no addiction liability, the sale, dispensing, or distribution may be made by a dealer to a consumer upon oral prescription of a duly registered physician, dentist, veterinary surgeon, or other practitioner, which oral prescription is reduced promptly to writing, and the writing filed and preserved by the dealer for a period of two years from the date on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556. In issuing an oral

prescription, the prescriber shall furnish the dealer with the same information as is required by law or regulation in case of a written prescription for narcotic drugs or compounds of a narcotic drug except for the written signature of the prescriber, and the dealer who fills such prescription shall be required to inscribe such information on the written record of the prescription made, filed and preserved by him, and shall inscribe on the label of the container of the narcotic drug or compound of a narcotic drug the same information as is required in filling a written prescription. An oral prescription shall not be refilled.

If the Secretary shall subsequently determine that a narcotic drug or a compound of a narcotic drug, to which the oral prescription procedure described in the preceding paragraph has been made applicable, possesses a degree of drug addiction liability that, in his opinion, results in abusive use of such procedure, he shall by regulation publish the determination in the Federal Register. The determination shall be final, and after the expiration of a period of six months from the date of its publication, the oral prescription procedure described in the preceding paragraph shall cease to apply to the particular narcotic drug or to the particular compound of a narcotic drug which is the subject of the determination.

*(3) Exportation.* To the sale, exportation, shipment, or delivery of narcotic drugs by any person within the United States or any Territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

*(4) Government and State officials.* To the sale, barter, exchange, or giving away of narcotic drugs to any officer of the United States Government or of any State, Territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, Territorial, district, county, or municipal or insular hospital or prisons.

*(d) Preservation.* Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away narcotic drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

*(e) Duplicates.* Every person who shall give an order as provided in this section to any other person for narcotic drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Secretary, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

*(f) Supply.* The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by said sections in his district. The price

at which such forms shall be sold by said collectors shall be fixed by the Secretary but shall not exceed the sum of $1 per hundred. Every collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring narcotic drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of narcotic drugs.

*(g) Unlawful use.* It shall be unlawful for any person to obtain by means of said order forms narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

Tit. 18, § 1001—*Statements or Entries Generally*

Whoever, in any matter within the jurisdiction of any department or agency of the United States *knowingly and willfully falsifies, conceals or covers up* by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Tit. 18, § 494—*Contractors' Bonds, Bids and Public Records*

Whoever falsely makes, alters, forges, or counterfeits any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or

Whoever utters or publishes as true or possesses with intent to utter or publish as true, and such *false*, forged, altered, or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited; or

Whoever transmits to, or presents at any office or to any officer of the United States, and such *false*, forged, altered, or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 711.

Tit. 26, § 3793—*Penalties and Forfeitures*

(a) *Fraudulent bonds, permits, and entries.*

(1) *Penalty.* Every person who—

(A) *Simulation or execution.* Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or

(B) *Procuring execution.* Procures the same to be falsely or fraudulently executed, or

(C) *Aiding in execution.* Advises, aids in, connives at such execution thereof—

shall be imprisoned for a term not less than one year nor more than five years, and

(2) *Forfeiture.* The property to which such false or fraudulent instrument relates shall be forfeited.

(b) *Fraudulent returns, affidavits, and claims*

(1) *Assistance in preparation or presentation.* Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(2) *Person defined.* The term "person" as used in this subsection includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

## APPENDIX "C"

### Judgment

Extract from the Minutes of August 9, 1955.

JULIUS BASCOM McBRIDE

No. 15370 versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 522

JULIUS BASCOM MCBRIDE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. 39–52; R. 913–928) is reported at 225 F. 2d 249.

### JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1955 (Pet. 60; R. 929), and a petition for rehearing was denied on September 17, 1955 (R. 938). By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to November 16, 1955, and the petition was filed on November 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether denial of the government's motion during the trial for a psychiatric examination of petitioner under 18 U. S. C. 4244 constituted reversible error, where such examination was made prior to sentencing, and where petitioner's counsel opposed the motion at the time it was made.

2. Whether, where petitioner suffered from a speech impediment, the trial judge's conduct, principally repeating petitioner's answers, constituted reversible error.

3. Whether the trial court properly charged that codeine dispensations by a physician to a patient, if not made in good faith and not in accordance with standard medical practice were not dispensed in the course of his professional practice within the meaning of 26 U. S. C. 2554 (c) (1).

4. Whether the court properly charged the jury that the phrase "knowingly and wilfully" as used in 18 U. S. C. 1001 means "deliberately and with knowledge" rather than with "an evil intent".

## STATUTES INVOLVED

The pertinent statutes involved, 18 U. S. C. 494, 1001, and 4244, and 26 U. S. C. 2554 and 3793,[1] appear in the Appendix, *infra,* pp. 21–24.

[1] The provisions of Title 26 involved were parts of the Internal Revenue Code of 1939, applicable to this case. In the 1954 Code, the same sections are now 4705 and 7206 (3).

STATEMENT

A twenty-six count indictment was returned in October, 1954, against petitioner, a duly licensed osteopath physician, charging him with unlawful dispensation of narcotics and with the making of false entries in connection therewith in his records, in violation of 26 U. S. C. 2554 and 3793 and 18 U. S. C. 494 and 1001 (R. 3–24). He was convicted on all counts (R. 880–881) and sentenced generally to a term of imprisonment for thirty months (R. 885–886). On appeal, the judgment of conviction was affirmed (Pet. 60; R. 929).

The evidence adduced at the trial may be summarized as follows:

Petitioner, a graduate of Rice Institute and Kirksville College of Osteopathy and Surgery in Texas, began practicing in Houston, Texas, in 1934, and during the period covered in the indictment was federally registered to dispense narcotics (R. 175–177, 713). In 1948, Lawrence D. Morrison, then a member of the Houston police force and in 1954 its chief, became his patient for general osteopathic treatment (R. 638, 652, 667, 715–716). In 1951 Morrison suffered an injury in an automobile accident which caused considerable pain, for which he unsuccessfully sought relief from petitioner (R. 510, 522–523, 639, 717–718). At the advice of a doctor of medicine, Dr. Billups, he entered a hospital in January, 1952 (R. 226, 562), where his illness was diagnosed as a ruptured intervertebral disc (R. 521, 526, 528–

529, 563, 565, 643). He was placed in traction (R. 565, 569–570, 641) and given narcotics for the pain (R. 572).

Upon his release from the hospital, Morrison continued his osteopathic treatments with petitioner (R. 644) and at petitioner's advice also secured X-ray treatment from another doctor in February, 1952 (R. 508, 645). The X-ray treatment resulted in a reaction which caused sleeplessness and nervousness (R. 646, 733, see R. 512). Petitioner, without advising Morrison, unsuccessfully experimented with barbiturates and pantopon [2] to alleviate this condition, and then resorted to codeine (R. 733–746). The codeine improved Morrison's condition promptly. When told that he had been given codeine, Morrison said that he did not get any "bang out of that" and requested more (R. 746). Thereafter, petitioner prescribed codeine mixed with empirin regularly for Morrison (R. 684, 747).

After about six months, Morrison complained about the cost of the codeine and asked petitioner if he could get it cheaper for him (R. 750). Petitioner began dispensing it to Morrison directly, but told him that "this narcotic kind of scares me" (R. 751). Morrison assured him it was all right as long as the doctor dispensed it to a legitimate patient (R. 751–752). Thereafter,

---

[2] Petitioner described pantopon as "just higher priced morphine" (R. 742).

during 1952 and 1953, petitioner dispensed straight codeine regularly and with ever increasing frequency to Morrison, giving him osteopathic treatments at the same time (R. 287–288, 685, 754, 775–776, 817). These dispensations, together with those he made regularly to three other patients, "worried" petitioner "a little bit" (R. 754–755) and troubled petitioner's wife (R. 763).

In May, 1953, Dr. Billups again placed petitioner in a hospital with a flare-up of the disc condition. He prescribed narcotics including codeine for him during this period, but testified that Morrison had practically ceased taking such narcotics when he was discharged. (R. 573, 625, 627.) However, unknown to Dr. Billups, petitioner visited and treated Morrison in the hospital even though he knew it "was against the rules" (R. 718–719).

During one of his regular office visits on January 2, 1954, Morrison observed petitioner noting his (Morrison's) name in his dispensation of narcotics record. When Morrison indicated surprise, petitioner said he had to "keep track of this thing". Morrison replied that he did not like it known that he was using codeine and that if it were known, he would not be able to hold his job. Petitioner replied "Gosh, that's what makes you good. If you didn't have this stuff, you couldn't hold your job." (R. 784.) Petitioner thereupon removed Morrison's name from the narcotics record and substituted that of Billy

Jackson, a bed-ridden patient of his with incurable cancer to whom he also dispensed codeine through a relative (R. 79, 99–100, 517–518, 674–675, 786).

Between January and May, 1954, petitioner dispensed about 800 grains of codeine to Morrison, who came to his office regularly (R. 291–292, 787), and recorded it in his narcotics dispensation record as having been dispensed to Billy Jackson (R. 75, 785–787). At first petitioner dispensed 100 ½ grain tablets, then increased it to 200 ½ grain tablets, with the time intervals between dispensations remaining about the same (R. 291–292). It is these transactions which gave rise to the charges covered in the indictment.

During this time, petitioner told one of his patients that he was giving "a shot of dope once in a while" to Morrison to keep him going (R. 833, 834), and that Morrison was a "dope head" (R. 835). During this time also Morrison did not want his visits to petitioner known and always parked on a side street and used petitioner's back door (R. 216).

In June, 1954, when narcotics officers visited petitioner in his office to examine his narcotics records, particularly as to Morrison, petitioner said "Oh yes, I have been expecting you"; and petitioner's wife said "Oh, I have been expecting something to happen" (R. 55, 214). In response to an inquiry as to his narcotics record, petitioner handed his record to one of the agents.

The agent reviewed it and said that he did not see Morrison's name on it. Petitioner answered that Morrison's name was not there but that in most instances where the record indicated dispensation to "Billy Jackson", Morrison had actually received the drug. (R. 75, 203.) He further stated to the agents that the substitution was made because Morrison had specifically told him that he did not want his name in the book (R. 76, 216); he explained that he could tell from the examination of the first part of the record, which contained his appointments, when Morrison rather than Jackson actually received the drug; whenever on a particular date Morrison's name appeared in the appointment part and Billy Jackson's in the narcotics part, Morrison actually received the drug (R. 77–78). At times, however, the record was not clear (see R. 822). One of the agents testified that if petitioner and his wife had not explained the Jackson entries after he inquired about Morrison, he would not have known from the examination of the book that these dispensations of drugs were not made to Jackson (R. 131).

Petitioner told the agents that although he initially gave codeine to Morrison to cure the X-ray reaction, Morrison continued to demand increased quantities and petitioner could not refuse him; he said that Morrision was a person with a lot of drive and that he needed narcotics

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to keep him going (R. 91-92, 141-142). He indicated that Morrison's disc condition was cured but that he was continuing the codeine because Morrison could not be spared from the job for the few weeks' hospitalization required to cure him of his addiction (R. 93-94, 166-167). Petitioner's wife said that she knew that her husband had been dispensing excessive amounts of narcotics and that the agents could have solved all this trouble if they had come one year earlier (R. 101-102, 137, 215). Petitioner and his wife agreed to go to the agents' office later and record their statements, but they failed to do so (R. 149-150).

Petitioner testified that when the narcotics agents asked for his dispensation record, he immediately explained the substitution of Jackson's name for that of Morrison before he handed over the record because he knew it was "a mess" (R. 797-798); that the substitution was merely a code which was explained to the agents and that he did not feel that there was anything wrong with it (R. 815); and that codeine *per se* had no addictive quality (R. 802, 804-809).

Medical experts testifying on behalf of the government stated that codeine had addictive qualities (R. 301-308, 411; see also R. 392, 460), as opposed to expert testimony adduced by the defense to the contrary (R. 544, 596-597). All experts agreed that the dispensation of codeine in the quantities petitioner dispensed to Morrison

and over that length of time was not in accordance with standard medical practice in the treatment of Morrison's ailment (R. 297, 374–375, 405, 460; see also R. 542–543, 553, 617).

## ARGUMENT

1. Petitioner's testimony was interrupted by the government's motion made outside of the jury's presence for a psychiatric examination under 18 U. S. C. 4244 to determine petitioner's competency to stand trial (R. 794). The government indicated that the motion was made because of petitioner's testimony that "Maybe I need a psychiatrist," and that petitioner had suffered a serious brain injury in 1938 (R. 794). The court overruled the motion (R. 797) after the following (R. 796):

> Mr. CASH [Defense Counsel]: Your Honor, I haven't seen any evidence at all in his testimony that he is not a sane man, and I don't think it is proper for the Government to insinuate any such thing. This man has told a story——
>
> The COURT: Your desire is to continue? I say, your desire is to continue with the trial?
>
> Mr. CASH: Yes, Your Honor.
>
> The COURT: You want to try it? What do you think about yourself?
>
> DEFENDANT MCBRIDE: I'm sure I'm sane.

After the jury verdicts were in, however, but prior to the imposition of sentence, the court *sua*

*sponte* ordered a psychiatric examination of petitioner by two reputable psychiatrists.[3] On the basis of this examination, the court concluded that petitioner was competent, and sentenced him.

Petitioner now complains (Pet. 9–19) for the first time that the trial court erred in denying the United States Attorney's motion under 18 U. S. C. 4244. He thus urges as error the very action both he and his counsel sought—the latter with some indignation—and ignores the additionally decisive point that there was actually a timely psychiatric examination.

While it may be true that the duty of ordering a psychiatric examination of the defendant is mandatory upon the court once a motion to that effect is made by the United States Attorney,[4] that question is not reached in this case. Here, after petitioner's counsel had opposed the gov-

[3] The psychiatrists' reports are not part of the record on appeal, but are being lodged with the Clerk of this Court. It will be noted that these reports are dated November 6, and November 17, 1954, and that the sentence on the verdict of October 22, 1954, was adjudged on November 26, 1954 (R. 885).

[4] See *Wear* v. *United States*, 218 F. 2d 24 (C. A. D. C.), holding that such a motion must be granted where it is made in good faith and is not frivolous. Cf. H. Rep. No. 892 (84th Cong., 1st Sess., p. 3), on H. R. 6585, enacted into Public Law 313, August 9, 1955, making the granting of a motion for such an examination in the District of Columbia discretionary with the court upon the presentation of *prima facie* evidence to support it. The purpose of this enactment was to reestablish the rule in effect prior to the *Wear* decision, *supra*. H. Rep. No. 892, *supra*, p. 3.

ernment's motion during the trial, the judge nevertheless required such examination before sentencing. This was plainly sufficient compliance with 18 U. S. C. 4244. Cf. *Taylor v. United States*, 222 F. 2d 398, and *Gunther v. United States*, 215 F. 2d 493, where the Court of Appeals for the District of Columbia Circuit—which decided in the *Wear* case (*supra*, fn. 4) that such a motion, made in good faith, requires the court to order an examination—held that a psychiatric examination and a judicial determination of competency upon remand from the Court of Appeals sufficiently complied with the provisions of 18 U. S. C. 4244. Accordingly, apart from the impropriety of petitioner's effort here to raise the point at all, there is no question that the requirements of the statute were met.

2. Petitioner imputes (Pet. 19–23) improper conduct to the trial judge upon the basis of several incidents which he describes as revealing the court's "personal involvement" in the form of "ridiculing and mocking" petitioner (Pet. 20). A reading of these incidents in context[5] shows

[5] The incidents are as follows:

"A. [Petitioner]: * * * He [Morrison] said, 'Can't you get it for me cheaper than that?' And—policemen are always—he is the best chief I ever saw—he made the policemen start paying their way. He made the policemen—he made them start paying for their beer and their coffee and everything else.

"Q. [Defense Counsel] What did you say, Doctor?

"A. A policeman pays for his coffee in Houston now. (Laughter) Before Mr. Morrison, a policeman never paid,

that they are not attempts to ridicule petitioner; they are reiterations by the court of petitioner's answers where petitioner, who has a speech im-

---

but now the police have to pay for their coffee. That's Chief Morrison.

"The COURT: He said they have to pay for their beer and coffee. He won't let them accept it free.

"A. That's right. But, anyway, it is a standard practice, standard medical practice, standard practice, to give a policeman a little bit of discount. (Laughter) (R. 750–751)

* * * * *

"Q. Now, Doctor, you have not testified before, have you, on anything? And I want to try to restrict you to certain questions. I mean try to answer the questions.

"A. Yes, sir, I'm sorry I'm excited.

"The COURT: He says he's a little excited. He says he's a little excited. (Laughter)" (R. 730.)

* * * * *

"Q. Well, answer my question.

"A. Yes, sir, but——

"Mr. SNODGRASS [Government Counsel]: Let the witness answer.

"Mr. CASH [Defense Counsel]: I am trying to hurry along, but if the government doesn't mind it, I don't.

"A. Am I doing wrong?

"The COURT: Huh?

"A. Am I doing wrong now?

"The COURT: Your lawyer will—I can't coach you. Your lawyer will have to—he says, 'Am I doing wrong?'

(Laughter)

"Mr. CASH: Sir?

"The COURT: He asked me, 'Am I doing wrong?' I told him he would have to ask you." (R. 734.)

* * * * *

"Mr. SNODGRASS: I don't think this witness is qualified to testify what is violation of the law.

"The COURT: Yes, the question of what is a violation of the law, gentlemen, you will get from the Court in charge and not from the witness——

"A. I beg your pardon.

pediment (Pet. 20), did not answer clearly. Even on the cold record, it seems clear that petitioner's selection of partially quoted excerpts, juxtaposed with notations of "(Laughter)", gives an inaccurate picture. The laughter evoked was a result of petitioner's testimony—not of judicial clowning, as petitioner suggests—and was frequent during petitioner's entire testimony. Most of it was evoked during petitioner's direct examination, and his counsel made little effort to avoid such testimony.

Here, for example, is one of the few incidents petitioner culls from the record and reports in truncated and inaccurate form, omitting alto-

---

"The COURT: Or a lawyer.

"A. I beg your pardon.

"The COURT: Go ahead.

"A. I should have known this, but the book law—the law is in the book that Mr. Morrison gave me.

"The COURT: I believe there is a question before the witness at this time. He is telling me that he thinks I am right, for the moment.

(Laughter)

"A. And, Judge, I sure do.

"The COURT: Well, thank you very much. Go ahead, gentlemen." (R. 764–765.)

* * * * *

"A. * * * I don't think you ought to send a patient to a doctor who will send you some money back, part of the fee, it's just as——

"Q. You don't think that's right?

"A. No, I don't.

"The COURT: He said he doesn't believe in fee splitting.

"A. That's right * * *." (R. 810.)

gether the portion preceding the trial judge's first statement:

> A. [Petitioner] * * * he [Morrison] was one of these blonds that are allergic to everything, and he wouldn't take a barbiturate——
>
> Q. I beg your pardon? Blond and couldn't take what?
>
> A. He was allergic to——
>
> The COURT: Blonds are allergic to everything.
>
> [Here, the petition describes the obvious repetition for clarity of petitioner's own statement as a "crack" by the judge, and erroneously states that "This drew '(Laughter),'" omitting the intervening statement of petitioner which actually preceded the "(Laughter)", and mistakenly describing petitioner's offer to "tell a joke too" as a response to a supposed joke the judge had not told (Pet. 21).]
>
> A. And when Dr. Billups tried——
>
> The COURT: Probably allergic to water.
>
> A. Well, he may be. That's one of the things that is wrong with him too.
>
> (Laughter)
>
> A. May I tell a joke too?
>
> The COURT: No, you had better just answer the questions. [R. 739–740]

The court's second phrase was, of course, unnecessary, but it certainly was not mocking of nor a reflection on petitioner, nor prejudicial in any way. The other selected quotations similarly fail to substantiate petitioner's complaint.

Furthermore, the failure of petitioner's trial counsel to raise any objection to any of these incidents at the time of their occurrence makes clear that the argument here is a "mere afterthought" (*Johnson* v. *United States*, 318 U. S. 189, 200–201) which does not call for further review on certiorari. Cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 238–239; *Holmgren* v. *United States*, 217 U. S. 509, 523; *Allis* v. *United States*, 155 U. S. 117, 122.

3. The even numbered counts of the indictment were laid under 26 U. S. C. 2554, which prohibits the dispensation of narcotics and creates an exception for the "distribution of narcotic drugs to a patient" by a registered physician in the course of his professional practice only.[4] On this exception the judge gave a full charge (R. 857–860), in part as follows (R. 857–858):

> * * * if dispensations were made in good faith and according to the standard medical practice, to cure a disease or injury or not merely to satisfy the craving of a person for such drug, then the dispensations may be said to have been made in the regular course of the defendant's professional practice only, but if the dispensations were not made in good faith, but were made to

[4] Petitioner speaks of this as an exception to the record-keeping requirement (Pet. 23). It is not that, since under 26 U. S. C. 2554 (c) (1) physicians are required to keep records of their dispensations.

> enable such person to obtain codeine sulphate to satisfy his appetite and craving for such drug only, not in the treatment of his patient, then the dispensation of such drug would not be in good faith, nor in the regular course of the defendant's professional practice as a physician, nor for legitimate medical purposes, and such sale and dispensation would not be lawful.

It is not a fair reading of the charge to argue, as petitioner does (Pet. 24–25), that it made standard medical practice virtually the only test of guilt or innocence. The court consistently coupled the factor of standard medical practice with good faith. Thus, immediately after the passage quoted by petitioner (Pet. 24–25)—that a physician's right to prescribe narcotics is subject to the limitations that "it must be done in accordance with recognized, standard medical practice" (R. 859)—the court charged (*ibid.*):

> As I mentioned to you a moment ago, as used in law, good faith simply means honesty, that is without fraud or collusion or deceit. Actually, without pretense. In other words, it simply means honesty.

And thereafter, in concluding his portion of the charge on these offenses, the court stressed good faith to the exclusion of standard medical practice, stating that petitioner would be guilty if the jury found he dispensed narcotics "not for legitimate medical purposes, and not in good faith" (R. 860).

* * *

The charge, as given, is in full accord with the decisions of this Court. *Linder* v. *United States*, 268 U. S. 5; *Boyd* v. *United States*, 271 U. S. 104, 106–108; see also *Richards* v. *United States*, 193 F. 2d 554 (C. A. 10), certiorari denied, 343 U. S. 930; *DuVall* v. *United States*, 82 F. 2d 382 (C. A. 9), certiorari denied, 298 U. S. 667. And the evidence, including petitioner's own admissions that he was afraid of what he was doing, fully justified the jury in finding that petitioner did not act in good faith. Standard medical practice is, of course, as the court below held, one factor which the jury could properly take into consideration in determining the issue of whether the dispensations were in the course of a physician's professional practice.

4. In connection with the false statement charges under 18 U. S. C. 1001, the instruction to the jury defined the phrase "knowingly and wilfully" used therein as follows (R. 854):

> * * *—and the word knowingly means with knowledge—and wilfully—and wilfulness is an element of the offense charged and is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully and knowingly made a false record or entry; to prove this element, it is not necessary that the Government prove that the Defendant in fact had an evil intent. The word wilful means no more than that the forbidden

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act is done deliberately and with knowledge. * * *

Petitioner asserts error in the court's charge, contending that the word "wilfully" should be interpreted as requiring an evil motive. But this Court in *United States* v. *Murdock,* 290 U. S. 389, 394–395, upon which petitioner relies (Pet. 30–31), held that "wilfully" is a word of many meanings. *Screws* v. *United States,* 325 U. S. 91, 101; *Spies* v. *United States,* 317 U. S. 492, 497; see also *Fields* v. *United States,* 164 F. 2d 97 (C. A. D. C.), certiorari denied, 332 U. S. 851–852. It can mean at one extreme performing an act with an evil purpose, or at the other extreme it can characterize conduct which is merely knowing or voluntary as distinguished from accidental. Its construction in each case must be determined from its context. *Screws* v. *United States, supra.* As applied to 18 U. S. C. 1001, the instruction given by the trial court finds ample support in cases decided thereunder (*Walker* v. *United States,* 192 F. 2d 47 (C. A. 10); see also *Mitchell* v. *United States,* 143 F. 2d 953, 956 (C. A. 10)), and under similar statutes. *Browder* v. *United States,* 312 U. S. 335 (false statement in passport application); *United States* v. *Norris,* 300 U. S. 564, 574; *United States* v. *Seavey,* 180 F. 2d 837 (C. A. 3), certiorari denied, 339 U. S. 979; *Fotie* v. *United States,* 137 F. 2d 831, 840 (C. A. 8); *United States* v. *Otto,* 54 F. 2d 277, 279 (C. A. 2)

(the latter cases involve the federal perjury statute).

Petitioner suggests (Pet. 33–38) that the allegedly erroneous charge that the government was not required to prove "evil intent" carried over to the charges under 18 U. S. C. 494 and 26 U. S. C. 3793, which require an evil intent. But the court clearly limited the quoted instruction solely to the charge under 18 U. S. C. 1001. The requisite intent which the jury was required to find under 18 U. S. C. 494 and 26 U. S. C. 3793 was discussed separately by the judge. Under 18 U. S. C. 494, the court charged that the jury must find beyond a reasonable doubt that the petitioner "did knowingly—that is with knowledge—did wilfully—that is deliberately—and voluntarily—did falsely make, alter, forge or counterfeit a certain writing for the purpose of defrauding the United States * * *" (R. 862), and under 26 U. S. C. 3793, the court charged that the false entries must be found to have been made "with evil intent" (R. 865). It is to be presumed that the jury followed instructions. *Opper* v. *United States,* 348 U. S. 84, 95.

Petitioner's further suggestion (Pet. 29–30), that there was not sufficient evidence of the requisite intent to support the convictions under the false entries charges, is amply refuted by the record (see Statement, *supra,* pp. 5–6, 7). That the government was ultimately not harmed by

the falsity of the records is immaterial, particularly since it is clear from the evidence that petitioner disclosed the falsity of the records only when he learned that the agents would soon discover their falsity. Petitioner's contrary argument would make false records non-criminal merely because the offense is acknowledged to government investigators on the verge of discovering it for themselves.

CONCLUSION

The conviction on any count of the indictment supports the general sentence imposed. *Pinkerton* v. *United States*, 328 U. S. 640. In this case there was no error as to any count, and no issue of importance is raised. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1955.

## APPENDIX

The relevant statutes provide in pertinent part:

18 U. S. C. 494:

> Whoever falsely makes, alters, forges, or counterfeits any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States * * *
>
> Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

18 U. S. C. 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more the $10,000 or imprisoned not more than five years, or both.

18 U. S. C. 4244:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall

file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

26 U. S. C. 2554:

(a) General requirement.

It shall be unlawful for any person to sell, barter, exchange, of give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(c) Other exceptions.

Nothing contained in this section, section 2563, or section 2564 shall apply—

(1) Use of drugs in professional practice.

To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: *Provided,* That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.

26 U. S. C. 3793:

(a) (1) Every person who—

(A) Simulation or execution.

Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, * * *

* * * * *

shall be imprisoned for a term not less than one year nor more than five years, * * *.

* * * * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 522

JULIUS BASCOM McBRIDE, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## REPLY BRIEF FOR PETITIONER

This Reply Brief is made necessary because the Government's Brief in Opposition (hereinafter cited as "Gov. Br.") so avoids the principal issues that it is necessary to restate them and explain how the purported answers strike very wide of the mark.

I. The first point raised in the Petition was that both the spirit and the letter of 18 U.S.C. § 4244 had been violated, because Petitioner had never been given a psychiatric examination for possible insanity or mental incompetency *during the trial.* The Government in effect concedes that such examination is "mandatory upon the court once a motion to that effect is made by the United States Attorney." Gov. Br., 10. But the Government would have the Court believe that such an examination was made in this case. There is no basis in fact for the Government's position.

The Government has lodged two purported "phychia-

trists' reports" with the Clerk of the Court. There is not one word in these reports which considers whether or not the Petitioner was sane or competent *at the time of the trial.* There is no trace of psychiatric consideration directed to determining whether Petitioner was "so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense", which the statute defines as the crucial issue, *at the time of the trial.*

The only fact that these reports do emphasize is the one already before the Court, namely, that the Trial Judge relied on no psychiatric reports for his own unsupported, offhand conclusion that Petitioner was sane and competent, *at the trial.* Even the Government recognizes that there was no determination of competence at, or even retroactively as of, the time of the trial.

These "reports" are those made at the time of sentence. The most the Government can do is to allege that "on the basis of this examination, the court concluded that petitioner was competent, *and sentenced him.*" Gov. Br., 10 (emphasis added).

But competence to be sentenced and competence to be tried are two completely different things. As defined in the very cases which the Government cites as condoning the admitted error in this case, proper judicial procedure requires that Petitioner be competent at two separate times, "*when he was tried* and when he was sentenced." *Gunther* v. *United States,* 215 F. 2d 493, 497 (C.A. D.C., 1954); *Taylor* v. *United States,* 222 F. 2d 398, 401 (C.A. D.C., 1955). (emphasis added.) In both these cases, there had been an actual judicial determination of competence to stand trial based upon psychiatric examination addressed to a different time, but the Court insisted that there be psychiatric examination bearing precisely on the issue of competence to stand trial *at the time of trial.* The authority cited by the Government should indeed govern this case, and it requires reversal and remand here, as in the cases cited.

The issue affecting substantial rights is whether Petitioner "was, in fact, incompetent *at the time of trial*". *Gunther* v. *United States, supra, ibid.* (emphasis added.)

Section 4244 "must be interpreted broadly enough to give effect to the apparent purpose of Congress that the question of competence to stand trial may be determined, at a judicial hearing distinct from the trial itself * * *." *Taylor* v. *United States, supra,* at 403. Even under the Government's version of the facts, that Congressional purpose was not satisfied in this case.

The Government's procedure here is instructive. Neither these reports nor any references thereto appeared in the Recordb elow, so that the Government's belated attempt to insert them in the Record seems obviously improper under Rule 21 of this Court. There is no support anywhere on the record for the bland assertion that the authors of the letters submitted were "reputable psychiatrists." Gov. Br., 10. Further, one letter, that of Dr. Skoglund, shows on its face that there was an enclosure, but no enclosure has been filed with the Clerk.

This covering letter does say that "I do not find evidence of a psychosis nor of any other type of mental deviation which has impaired either his thinking or his understanding of the reasonable consequence of his actions." Obviously, this does not consider, and *a fortiori* does not attempt to answer, the question of whether Petitioner was competent to understand the proceedings against him and to assist in his own defense, at the trial.

Moreover, the other letter, which is presumably submitted in its entirety, obviously relies upon a test of sanity which the Court of Appeals for the District of Columbia has expressly discarded, in a decision to which the Solicitor General has given public approval. This letter, by Dr. Greenwood, concludes, "Although he recognizes the difference between right and wrong, I believe that he would probably make mistakes in the future." The right-or-wrong test for sanity or competence—necessarily for use at any time; before and after, as well as during the trial—was discarded in *Durham* v. *United States,* 214 F. 2d 862 (C.A. D.C., 1954), which was enthusiastically acclaimed in Sobeloff, *Insanity and the Criminal Law: From McNaughton to Durham, and Beyond,* 41 A.B.A.J. 793 (1955). In any event, whether

Dr. Greenwood was right or wrong, he obviously was not concerned at all with the question whether Petitioner was sane or competent *at his trial.*

If materials lodged with the Clerk at this stage are properly before the Court, Petitioner has also now submitted certain documents for the Court's consideration. These bear upon the issue of whether the "psychiatrists' reports" proferred by the Government are responsive to the issue of Petitioner's mental state *at his trial.*

First, the Order of the Trial Court for the examination is submitted. This reveals the utter absence of any instructions to these doctors. Clearly there is no request for any examination or finding bearing upon Petitioner's mental or emotional state at his trial.

Further, the validity of the examinations made is called into question by two affidavits filed with the Clerk. One is that of the neurosurgeon who has been treating Petitioner over the years; this affidavit of Dr. James Albert Brown, *inter alia,* discloses that the probation officer was informed that Dr. Brown believed that Petitioner was irrational. There is nothing to indicate that the Trial Court was aware of this opinion, even at the time of sentencing.

The other affidavit is that of Petitioner himself. Ordinarily this would not be tendered the Court, as presumably self-serving; but it must be remembered that the Trial Court rejected the Government's motion under 18 U.S.C. § 4244 ultimately upon Petitioner's own "medical opinion" that he was sane. (R., 796). With his testimony thus relied on by the Court as that of an expert on psychiatry and on the sanity of Julius Bascom McBride, Petitioner's affidavit is entitled to substantial consideration, when he evaluates these "psychiatrists' reports." Petitioner states that he did not recognize the examinations by these two doctors to be psychiatric examinations; instead, they were so brief and cursory that Petitioner took them to be X-ray checks and did not even inform his present counsel concerning them.

It is true that one of these Government "psychiatrists" (Dr. Greenwood) declared that Petitioner's "judgment is

not good, and I would doubt his competence to practice medicine." The fact is, however, that the Trial Judge expressly relied on Petitioner's medical judgment, at least *during the trial.*

Competence to be sentenced is different from competence to stand trial. There is a difference in time: a defendant who was in fact insane during the trial might have sufficiently recovered to be adjudged sane at the time of sentencing. There is a difference in the context of psychiatric examination: since the examination is requested for the purpose of sentence, the psychiatrist knows that the subject has already been convicted—presumably in a trial during which he was adjudged clearly and definitely sane and competent—and the psychiatrist must feel that he is asked only to make a general report for sentencing, and not to make a specific finding and examination addressed precisely to the issue of competence at the trial. There is a difference in judicial function: a Judge might sentence a convict more leniently, or as in this case to Springfield, if the reports suggested any type of mental or emotional weakness or impairment; while the Court might feel that only certain types or levels of mental incompetence would justify suspending or withholding the trial itself.

Congress recognized this difference. Section 4244 demands that the examination proceed forthwith, and be addressed to sanity or competence at the trial. The Judge must cause the psychiatric examination to be made "upon" the motion of the United States Attorney; and the judicial determination of sanity or competence shall not "be admitted in evidence", and "shall in no way prejudice the accused in a plea of insanity * * * nor otherwise be brought to the notice of the jury." It is virtually impossible to read this language as sanctioning psychiatric examinations at some later time in the Judge's discretion, rather than immediately. Certainly there is no Congressional wording which condones any delay in examination until *after* the trial.

Section 4244 establishes an admittedly mandatory procedure for insuring that no defendant who is incompetent to understand the nature of the proceedings against him or

to assist in his own defense shall ever stand trial in a Court of the United States. Because the Judge admittedly deviated from Section 4244, that may have happened in this case. No psychiatrist has ever been instructed to determine, and none has found, whether or not Petitioner was actually sane or competent *at his trial.* Suggesting that he was sane or competent at some other time does not satisfy Section 4244.

This is no harmless error, as the Government would casually prefer to have this Court believe. Here the United States Attorney believed in good faith that Petitioner was insane or incompetent at his trial. No psychiatrist has ever examined Petitioner for the purpose of judging whether the United States Attorney was right. The Trial Court has made no pretense of complying with Section 4244, either at or after the trial.

If this case should stand unreviewed, Section 4244 could be diluted beyond recognition of the clear Congressional intention. Trial Courts would be encouraged to push trials on to their conclusion, rather than to interrupt them, before ordering a psychiatric examination. This would almost certainly tend to weight the psychiatrists' minds against a finding of insanity or incompetence. For this and other reasons, Congress clearly intended no such result. What transpired in this case contravenes both the spirit and the letter of Section 4244.

The issue is one of general importance, affecting as it does all Federal criminal trials wherein the competence of defendants may be in issue; and the decisions of the Court of Appeals for the District of Columbia are in clear and square conflict with the proceedings at bar. This Court should grant certiorari, and should forthwith reverse, and remand for psychiatric examination and for judicial determination, upon fair hearing, in accordance with Section 4244, of the question whether Petitioner was sane and competent *at his trial.*

II. The second issue raised in the Petition was whether the Trial Judge had so governed the trial as to maintain the minimally requisite atmosphere of judicial calm. It

was contended that special judicial care was required, because of the physical and mental failings of the Petitioner; but it obviously was not provided.

What is the Government's answer? It certainly is no affirmative statement that the Trial Judge afforded Petitioner every respect and protection to which he was entitled. The Government concedes that the Court indulged in "unnecessary" remarks. Gov. Br., 12. And it admits that "laughter * * * was frequent during petitioner's entire testimony." Gov. Br., 13. While alluding to Petitioner's "speech impediment" as presumably causing this frequent laughter, Gov. Br., 12-13, and while now offering the Court "psychiatrists' reports" that reveal Petitioner as something less than completely normal, the Government makes no claim that the Trial Court took these considerations into account.

Indeed, the Government in effect concedes that the Court called attention to Petitioner's defects, without taking any action to protect him against prejudicial jury inferences. For the Government attempts to justify the Court's conduct as necessary repetition of what Petitioner said, because of his speech defect. Even if this were true, it would reveal such an inability to govern the proceedings calmly and dispassionately as to vitiate the entire proceedings.

It is not true, however, that the Trial Judge contented himself with repetition he regarded as necessary. He did not repeat; he extemporized. He was no echo, but an independent and superior wit.

In the one exchange quoted in the Government text, Gov. Br., 14, for example, the point of Petitioner's testimony was that Morrison was allergic; but the Court generalized that "Blonds are allergic to everything." And his subsequent intensification of the witticism, "Probably allergic to water", has absolutely no referent in the remarks of Petitioner. This was not neutrally "unnecessary", as the Government prays the Court to believe. It was a remark undertaken on the judicial initiative, reflecting the good spirits of the Court himself—at Petitioner's expense.

Likewise, there is no impartial repetition in the colloquies

quoted in fn. 5, Gov. Br., 11-13. These reveal an aggressive judicial bantering, taking the jury's attention completely away from the substantive point of Petitioner's testimony.

In the first instance, Petitioner was obviously trying to explain that Chief Morrison was doing a fine job, and had introduced worthwhile reforms in his administration of the police department. The Court seized on one minor aspect of this, which the Petitioner had intended only as a practical illustration, and he embellished it by adding, "He won't let them accept it free." This is not repetition; it is addition, lest the jury miss the point of the joke—and lest it get the point of the testimony.

In the second instance, the Judge mocked what was nothing less than an embarrassed apology by the Petitioner for his inability to think clearly. Petitioner's humble "I'm sorry I'm excited" became a jeering "He says he's a little excited. He says he's a little excited. (Laughter)." This is repetition, not the neutral once to clarify, but the partisan twice to mock and ridicule. Again, in the next instance, Petitioner begged for guidance from the Judge, only to be rebuffed by the aggressive judicial wit. "Am I doing wrong now?", in a process which the Government describes as only "reiterations by the court of Petitioner's answers", brought forth "Your lawyer will—I can't coach you. Your lawyer will have to—he says, 'Am I doing wrong?' (Laughter)."

Further, when the Court declares "He is telling me that he thinks I am right, for the moment", there is nothing upon which the Government can fasten any claim of "reiterations". This remark means nothing other than: "Imagine: This defendant, this pitiable and handicapped wretch, presumes to judge whether I am right or wrong—*me*, a Federal Judge!"

Even on the cold record, it seems clear that such personal involvement of the Court cannot be condoned. The Government's unsupported generalizations from the Record cannot conceal the fact that the Court did in fact ridicule Petitioner, irresistibly directing the attention of the jury

to Petitioner's personal failing, and distracting it from the genuine merits of the case. The Trial Court did not properly govern the trial, to preserve an atmosphere of judicial calm and the appearance of impartiality, as was required by due process and the decisions of this Court.

III. In its third point, the Petition argued that Petitioner had been convicted for failing to comply with "standard medical practice", a standard not to be found in the statute or in the decisions of this Court. The answer misreads the charge, is inadequate even on its own interpretation of the charge, and is erroneous under the cases it cites.

We still believe that the charge, fairly read, is capable only of being interpreted as making conformance to "standard medical practice" the only criterion; there is nothing to add on that score. Even if the Government were correct, "standard medical practice" and "good faith" were "coupled". Gov. Br., 16. In other words, it was necessary for the jury to make *two* findings, in order for Petitioner to be considered within the statutory exemption. Unless Petitioner acted in good faith *and* in accordance with standard medical practice, he was covered by the statutory prohibition and eligible to be found guilty. The error of the Trial Court is thus even more egregious under the Government's reading of the charge.

The scope of the exemption which is at issue here should be restated, because of an inadvertent possible effect of confusion in the manner of Petitioner's wording of Questions 3 and 4 of the "Questions Presented", upon which Point III depends. Pet., 3, 23-28. While the Petition is written as if only the "record keeping" requirements were involved, this was only an elliptical method of reference to the two provisions of the statute, dispensation and record keeping. The Questions and discussion were intended to be applied to both, and were evidently so taken by the Government. Gov. Br., 15-17. The basic provision of the statute is to prohibit dispensation of drugs except upon certain order forms. From this dispensation requirement exemption is made of dispensations "by a physician * * * in the course of his professional practice only." Even on these dispensa-

tions, however, records must be kept, "except [of] such [drugs] as may be dispensed * * * to a patient upon whom such physician * * * shall personally attend." 26 U.S.C. § 2554. The references in the Petition to the exemption for dispensation "by a physician * * * in the course of his professional practice only * * * to a patient upon whom such physician * * * shall personal attend" were intended to cover both exemptions in the statute. Obviously, Petitioner contends that if the charge on this issue had been validly given, there could not have been a valid conviction on *any* count.

"Good faith" is, of itself, a neutral term. It must be given content and context—good faith toward what end, in what course of conduct? Certainly Petitioner would have been satisfied by the charge quoted in *Linder* v. *United States*, 268 U. S. 5, 17, that "If, on the other hand, you believe from the testimony that the defendant believed in good faith this women was suffering from cancer or ulcer of the stomach, and administered the drug for the purpose of relieving her pain, or if you entertain a reasonable doubt upon that question, you must give the defendant the benefit of the doubt and find him not guilty." And Petitioner would have been content with the charge quoted in *Boyd* v. *United States*, 271 U. S. 104, 107-108, that "* * * in determining whether or not the defendant in prescribing morphine to his patients was honestly seeking to cure them of the morphine habit, while applying his curative remedies, it is not necessary for the jury to believe that defendant's treatment would cure the morphine habit, but it is sufficient if defendant honestly believed his remedy was a cure for this disease." While the Government relies on these cases, Gov. Br., 17, there simply is no relationship between them and the charge actually delivered in this case, which made *no reference to the honest beliefs of Petitioner.*

The very point of Petitioner's complaint in Point III is that his honest belief in the medical benefits he was bringing to his patient should expressly have been brought to the attention of the jury, as they were in *Linder* and *Boyd*, and not hidden or obscured by an equation or coupling of "good

faith" with "standard medical practice". Petitioner would simply not have submitted this point to the Court if there had in fact been the compliance which the Government implies with *Linder* and *Boyd*.

It may be true that "Standard medical practice is * * * one factor which the jury could properly take into consideration in determining the issue of whether the dispensations were in the course of a physician's professional practice," Gov. Br., 17, but it is false to imply that the Trial Court so charged. It made conformance with "standard medical practice" *the* primary factor, and either the only criterion or a criterion coupled with "good faith". The statutory standard, as explained in the cases cited by the Government, emphasizes the personal intent of the defendant physician, a factor conspicuously absent from this charge.

The Government does not deny the statement in the Petition that "This is apparently the first case in which a physician has been convicted for prescriptions which he himself believed were helpful and non-addictive, and which were made in the course of practice and treatment of a genuine patient." (Pet., 26). Limiting the jury's consideration to "standard medical practice" was obviously error. This Court should not permit a conviction based thereon to stand.

IV. Again in its answer to point IV of the Petition, the Government's answer is to evade the chief issues presented by each of the three statutes under which Petitioner was convicted.

On 18 U.S.C. § 1001, the Government continues to rely on *Walker* v. *United States*, 192 F. 2d 47 and *Mitchell* v. *United States*, 143 F. 2d 953, in ignorance of or indifference to the basic distinctions pointed out in the Petition, pp. 32-33. If the Government had made any attempt to meet the substantive merits of Petitioner's contentions, its assurance would be at least understandable, even if obviously misplaced. In the absence of any such attempt, its statements are unsupported self-serving generalizations.

The two other statutes, 18 U.S.C. § 494 and 26 U.S.C. §

3793 are discussed as one by the Government, Gov. Br., 19, possibly because there is no way of contending that the charge under the former statute, considered alone, was valid. Although 18 U.S.C. § 494 requires that there be no conviction unless there is a "purpose of defrauding the United States", the Trial Court did not discuss this crucial phrase. It did not charge that the jury need find any "evil intent" whatever. Instead, it charged that the jury could convict if only it found that the admitted act of writing Jackson's name for Morrison's was done "deliberately and voluntarily". Precisely this approach was condemned by an unanimous Court in *Morrisette* v. *United States*, 342 U. S. 246, as explained at pp. 35-36 of the Petition. The Government had no stomach for this point, perhaps hoping that its failure even to mention *Morrisette* would induce this Court to overlook the fundamental precepts of that case.

Nor did the Government deign to mention *Sullivan* v. *United States*, 178 F. 2d 723 (C.A. D.C., 1949), with which the decision below is in square conflict. See Petition, pp. 36-37.

Finally, with regard to 26 U.S.C. § 3793, there is at best a confusion and inconsistency in the instructions. The jury was told both that "evil intent" must be found (which they were *not* told under 18 U.S.C. § 494) and that the mere doing of the physical act was enough. In the face of this contradiction and confusion, it requires an extremely pugnacious advocacy to cite *Opper* v. *United States*, 348 U. S. 84, 95, where, in a joint trial of two defendants, this Court upheld a conviction only on the finding that "The trial judge here made clear and repeated admonitions to the jury at appropriate times * * *." Here there was no clarity, and certainly no repetition of the correct statement of the law, on 26 U.S.C. § 3793, or on any other subject.

* * * * *

If the Court declines to review this case, the Government will have "won" another conviction. Under a scorecard theory of jurisprudence, this victory would be triumph enough. But a Federal criminal defendant will have been tried without any determination of whether he was insane

or incompetent at the time of his trial. And even his belated and cursory examination by psychiatrists will have proceeded under a legal test of insanity publicly condemned by the Solicitor General. Further, that Petitioner will have been tried by a Judge who mocked and ridiculed him. He will have been convicted in effect for not having submitted his professional judgment in treating a patient to a vague "standard medical practice", a test unwarranted and unauthorized by any statute. He will have been convicted of a crime under a standard of criminality which expressly excludes "evil intent", even under statutes expressly requiring the purpose "to defraud the United States". His trial and sentencing will have been conducted under rules of law flatly inconsistent with decisions of the Court of Appeals for the District of Columbia and of this Court.

All this seems worthy of review, and reversal, by this Court, under the preferable theory of the proper role of Government in criminal cases: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

## CONCLUSION

For the reasons stated in this Reply Brief, and appearing elsewhere in the record of this cause, the petition for certiorari should be granted.

Respectfully submitted,

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## ADDENDUM

Petitioner is filing with the Clerk of this Court a certified copy of the sentencing proceedings, which was received by counsel after the printing of this Reply Brief. This transcript, which was ignored by the Government, is of the utmost significance. It completely destroys the primary basis for the Government's opposition on the first issue in the Petition.

As its primary rebuttal to Petitioner's claim of flagrant violation of 18 U.S.C. § 4244, the Government lodged with the Clerk of this Court two letters purporting to be "psychiatrists' reports". It is now clear that the Trial Court did not so regard them.

The Trial Court refers to these "psychiatrists" as only "neurosurgeons". Reporter's Transcript of Proceedings of November 26, 1954, p. 11. Obviously, whatever the Government may believe or state to this Court at this time, the Trial Court did not purport to rely on any reports by psychiatrists.

Further, this transcript makes absolutely clear that the Trial Court made no finding that Petitioner was sane or competent, *during the trial.* Quite the contrary, it is unmistakably evident that the Trial Court gave no consideration whatever to this issue.

What the Trial Court believed and did is crucial. The Government may believe—and it may even be objectively true—that these doctors are psychiatrists. On this record, however, they are certainly not shown to be "qualified psychiatrists", as is required by the statute. Now the record demonstrates plainly that the Trial Court tried and sentenced, without submitting Petitioner to an examination under 18 U.S.C. § 4244, or to any examination by doctors whom the Trial Court thought of as "psychiatrists", let alone duly "qualified psychiatrists".

This procedure constitutes a complete departure from that made mandatory by 18 U.S.C. § 4244. The petition

for a writ of certiorari should be granted, and the judgm of conviction, affirmed below, forthwith reversed.

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